THE GENERAL STATUTES OF NORTH CAROLINA

1969 CUMULATIVE SUPPLEMENT

Completely Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers

UNDER THE DIRECTION OF
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AND SYLVIA FAULKNER

Volume 1A

Place in Pocket of Corresponding 1953 Recompiled Volume of Main Set and Discard Previous Supplement

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Preface

This Cumulative Supplement to Recompiled Volume 1A contains the general laws of a permanent nature enacted at the 1953, 1955, 1956, 1957, 1959, 1961, 1963, 1965, 1966, 1967 and 1969 Sessions of the General Assembly, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments of former laws are inserted under the same section numbers appearing in the General Statutes and new laws appear under the proper chapter headings. Editors' notes point out many of the changes effected by the amendatory acts.

Chapter analyses show new sections and also old sections with changed captions. An index to all statutes codified herein prior to 1961 appears in Replacement Volumes 4B and 4C. The Cumulative Supplements to such volumes contain an index to statutes codified as a result of the 1961, 1963, 1965, 1966, 1967 and 1969 legislative sessions.

A majority of the Session Laws are made effective upon ratification but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after thirty days after the adjournment of the session" in which passed. All legislation appearing herein became effective upon ratification, unless noted to the contrary in an editor's note or an effective date note.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement, and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

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Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1953, 1955, 1956, 1957, 1959, 1961, 1963, 1965, 1967 and 1969 Sessions of the General Assembly affecting Chapters 1, 1A and 1B of the General Statutes.

Annotations:

Sources of the annotations:

North Carolina Reports volumes 233 (p. 313)-275 (p. 341).
North Carolina Court of Appeals Reports Volumes 1-5 (p. 227).
Federal Reporter 2nd Series volumes 186 (p. 745)-410 (p. 448).
Federal Supplement volumes 95 (p. 249)-298 (p. 1200).
United States Reports volumes 340 (p. 367)-394 (p. 575).
Supreme Court Reporter volumes 71 (p. 474)-89 (p. 2151).
North Carolina Law Review volumes 29 (p. 227)-47 (p. 731).
Wake Forest Intramural Law Review volumes 2-5.

The General Statutes of North Carolina
1969 Cumulative Supplement

VOLUME 1A

Chapter 1.

Civil Procedure.

SUBCHAPTER I. DEFINITIONS AND GENERAL PROVISIONS.

Article 2.

General Provisions.

Sec.
1-9. [Repealed.]
1-12. [Repealed.]

SUBCHAPTER II. LIMITATIONS.

Article 3.

Limitations, General Provisions.

1-14. [Repealed.]
1-15. Statute runs from accrual of action.
1-16. [Repealed.]
1-25. [Repealed.]
1-27. Act, admission or acknowledgment by party to obligation, co-obligor or guarantor.

Article 4.

Limitations, Real Property.

1-42.1. Certain ancient mineral claims extinguished.
1-44.1. Presumption of abandonment of railroad right of way.

SUBCHAPTER III. PARTIES.

Article 6.

Parties.

1-61. [Repealed.]
1-63 to 1-65.5. [Repealed.]
1-66 to 1-69. [Repealed.]
1-69.1. Unincorporated associations; suit by or against.
1-70, 1-71. [Repealed.]
1-73 to 1-75. [Repealed.]

SUBCHAPTER IIIA. JURISDICTION.

Article 6A.

Jurisdiction.

1-75.1. Legislative intent.
1-75.2. Definitions.
1-75.3. Jurisdictional requirements for judgments against persons, status and things.

Sec.
1-75.4. Personal jurisdiction, grounds for generally.
1-75.5. Joinder of causes in the same action.
1-75.6. Personal jurisdiction — manner of exercising by service of process.
1-75.7. Personal jurisdiction — grounds for without service of summons.
1-75.8. Jurisdiction in rem or quasi in rem—grounds for generally.
1-75.9. Jurisdiction in rem or quasi in rem—manner of exercising.
1-75.10. Proof of service of summons, defendant appearing in action.
1-75.11. Judgment against nonappearing defendant, proof of jurisdiction.
1-75.12. Stay of proceeding to permit trial in a foreign jurisdiction.

SUBCHAPTER IV. VENUE.

Article 7.

Venue.

1-86. [Repealed.]
1-87. Transcript of removal; subsequent proceedings; depositions.
1-87.1. [Repealed.]

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

Article 8.

Summons.

1-88 to 1-91. [Repealed.]
1-94 to 1-98. [Repealed.]
1-98.1. Service of process by publication and service of process outside the State; when allowed.
1-98.2. Actions and special proceedings in which service of process may be had by publication or by service of process outside the State.
1-98.3. Persons upon whom service of process may be had by publication or by service of process outside the State.

Sec.
1-98.4. Affidavit for service of process by publication or service of process outside the State, amendment thereof; extension of time for pleading.
1-99. [Repealed.]
1-99.1. Form of order for service of process by publication or service of process outside the State.
1-99.2. Notice of service of process by publication.
1-99.3. Form of notice of service of process by publication.
1-99.4. Cost of publication of notice in lieu of personal service.
1-100 to 1-107.3. [Repealed.]
1-108. Defense after judgment set aside.

Article 10.

Joint and Several Debtors.

1-115. [Repealed.]

Article 11.

Lis Pendens.

1-116.1. Service of notice.

SUBCHAPTER VI. PLEADINGS.

Article 12.

Complaint.

1-121 to 1-123. [Repealed.]

Article 13.

Defendant's Pleadings.

1-124 to 1-126. [Repealed.]

Article 14.

Demurrer.

1-127 to 1-134. [Repealed.]

Article 15.

Answer.

1-134.1 to 1-138. [Repealed.]
1-139. Burden of proof of contributory negligence.

Article 16.

Reply.

1-140 to 1-142. [Repealed.]

Article 17.

Pleadings, General Provisions.

1-143 to 1-147. [Repealed.]
1-150 to 1-160. [Repealed.]

Article 18.

Amendments.

1-161 to 1-163. [Repealed.]
1-165. [Repealed.]
1-167 to 1-169. [Repealed.]

SUBCHAPTER VII. PRETRIAL HEARINGS; TRIAL AND ITS INCIDENTS

Article 18A.

Pretrial Hearings.

Sec.
1-169.1 to 1-169.6. [Repealed.]

Article 19.

Trial.

1-170 to 1-173. [Repealed.]
1-175 to 1-179. [Repealed.]
1-180.1. Judge not to comment on verdict.
1-181.1. View by jury.
1-183. [Repealed.]
1-183.1. Effect on counterclaim of nonsuit as to plaintiff's claim.
1-184, 1-185. [Repealed.]
1-187. [Repealed.]

Article 20.

Reference.

1-188 to 1-195. [Repealed.]

Article 21.

Issues.

1-196 to 1-200. [Repealed.]

Article 22.

Verdict and Exceptions.

1-201. [Repealed.]
1-203 to 1-207. [Repealed.]

SUBCHAPTER VIII. JUDGMENT

Article 23.

Judgment.

1-208. [Repealed.]
1-209.1. Petitioner who abandons condemnation proceeding taxed with fee for respondent's attorney.
1-209.2. Voluntary nonsuit by petitioner in condemnation proceeding.
1-211 to 1-215. [Repealed.]
1-217.2. Judgments by default to remove cloud from title to real estate validated.
1-218 to 1-222. [Repealed.]
1-224 to 1-227. [Repealed.]
1-235. Of appellate division docketed in superior court; lien.
1-239. Paid to clerk; docket credited; transcript to other counties; notice to attorney for judgment creditor.
1-240. [Repealed.]

Article 24.

Confession of Judgment.

1-247 to 1-249. [Repealed.]

Article 25.

Submission of Controversy without Action.

Sec.

1-250 to 1-252. [Repealed.]

SUBCHAPTER IX. APPEAL

Article 27.

Appeal.

1-270. Appeal to appellate division; security on appeal; stay.

1-287.1. Dismissal of appeals to appellate division when statement of case not served within time allowed.

SUBCHAPTER X. EXECUTION

Article 28.

Execution.

1-315. Property liable to sale under execution, bill of sale.

1-324.1. Judgment against corporation, property subject to execution.

1-324.2. Agent must furnish information as to corporate officers and property.

1-324.3. Shares subject to execution; agent must furnish information.

1-324.4. Debts due corporation subject to execution; duty, etc., of agent.

1-324.5. Violations of three preceding sections misdemeanor.

1-324.6. Proceedings when custodian of corporate books is a nonresident.

1-324.7. Duty and liability of nonresident custodian.

Article 29A.

Judicial Sales.

Part 1. General Provisions.

1-339.3a. Judge or clerk may order public or private sale.

Article 29B.

Execution Sales.

Part 2. Procedure for Sale.

1-339.68. Deed for real property sold; property subject to liens; orders for possession.

Article 29C.

Validating Sections.

1-339.77. Validation of certain sales confirmed prior to time prescribed by law.

SUBCHAPTER XII. SPECIAL PROCEEDINGS

Article 33.

Special Proceedings.

Sec.

1-393. Chapter and Rules of Civil Procedure applicable to special proceedings.

1-401. Clerk acts summarily; signing by petitioners; authorization to attorney.

1-407. Commissioner holding proceeds of land sold for reinvestment to give bond.

1-407.1. Bond required to protect interest of infant or incompetent.

1-407.2. When court may waive bond; premium paid from fund protected.

1-408.1. Clerk may order surveys in civil actions and special proceedings involving sale of land.

SUBCHAPTER XIII. PROVISIONAL REMEDIES

Article 37.

Injunction.

1-485. When preliminary injunction issued.

1-489 to 1-492. [Repealed.]

1-496, 1-497. [Repealed.]

1-498. Application to extend, modify, or vacate; before whom heard.

1-499. [Repealed.]

Article 38.

Receivers.

Part 1. Receivers Generally.

1-506. [Repealed.]

Part 2. Receivers of Corporations.

1-507.1. Appointment and removal.

1-507.2. Powers and bond.

1-507.3. Title and inventory.

1-507.4. Foreclosure by receivers and trustees of corporate mortgagees or grantees.

1-507.5. May send for persons and papers; penalty for refusing to answer.

1-507.6. Proof of claims; time limit.

1-507.7. Report on claims to court; exceptions and jury trial.

1-507.8. Property sold pending litigation.

1-507.9. Compensation and expenses; counsel fees.

1-507.10. Debts provided for, receiver discharged.

1-507.11. Reorganization.

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES

Article 40.

Mandamus.

1-511 to 1-513. [Repealed.]

Article 43.

Nuisance and Other Wrongs.

Sec.
1-538.1 Damages for malicious or wilful destruction of property by minors.
1-539.1 Damages for unlawful cutting or removal of timber; misrepresentation of property lines
1-539.2 Dismantling portion of building

Article 43A.

Adjudication of Small Claims in Superior Court.

1-539.3. Small claims defined; to what actions article applies
1-539.4. Small claims docket; caption of complaint; when value of property to be stated; deposit for costs.
1-539.5 Jury trial.
1-539.6 Transfer of action to regular civil issue docket
1-539.7 Civil appeals to superior court placed on small claims docket
1-539.8 Article applicable only in counties which adopt it.

Article 43B.

Defense of Charitable Immunity Abolished.

1-539.9. Defense abolished as to actions arising after September 1, 1967.

SUBCHAPTER XV INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

Article 44.

Compromise.

Sec.
1-540.1 Effect of release of original wrongdoer on liability of physicians and surgeons for malpractice.
1-540.2. Settlement of property damage claims arising from motor vehicle collisions or accidents; same not to constitute admission of liability, nor bar party seeking damages for bodily injury or death.
1-541 to 1-543. [Repealed.]

Article 44A.

Tender.

1-543.1. Service of order of tender; return.

Article 46.

Examination before Trial.

1-568.1 to 1-568.27. [Repealed.]

Article 47.

Motions and Orders.

1-577 to 1-584. [Repealed.]

Article 48.

Notices.

1-585 to 1-589. [Repealed.]
1-589.1. Withholding information necessary for service on law-enforcement officer prohibited.
1-590 to 1-592. [Repealed.]

SUBCHAPTER I. DEFINITIONS AND GENERAL PROVISIONS

ARTICLE 1.

Definitions.

§ 1-2. Actions.

An inquisition of lunacy is not a civil action as defined in this section. In re Dunn, 239 N.C. 378, 79 S.E.2d 921 (1954).

Quoted in Gillikin v. Gillikin, 248 N.C. 710, 104 S.E.2d 861 (1958).

§ 1-3. Special proceedings.

An inquisition of lunacy is not a special proceeding under this section. In re Dunn, 239 N.C. 378, 79 S.E.2d 921 (1954).

Cited in Gillikin v. Gillikin, 248 N.C. 710, 104 S.E2d 861 (1958).

§ 1-5. Criminal action.

An inquisition of lunacy is not a criminal action within the meaning of this section. In re Dunn, 239 N.C. 378, 79 S.E.2d 921 (1954).

Cited in State v. Rumfelt, 241 N.C. 375, 85 S.E.2d 398 (1955).

§ 1-6. Civil action.

Cited in Gillikin v. Gillikin, 248 N.C. 710, 104 S.E.2d 861 (1958).

ARTICLE 2.

General Provisions.

§ **1-9**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — For provisions similar to those of the repealed section, see Rule 2 of the Rules of Civil Procedure (§ 1A-1).

§ 1-11. How party may appear.

Cannot Appear in Person, etc.—

A party has the right to appear in propria persona or by counsel but this right is alternative. State v. Phillip, 261 N.C. 263, 134 S.E.2d 386 (1964).

Counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived. State v. Alston, 272 N.C. 278, 158 S.E.2d 52 (1967).

The constitutional right to counsel does not justify forcing counsel upon an accused who wants none. State v. Alston, 272 N.C. 278, 158 S.E.2d 52 (1967).

§ **1-12**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

SUBCHAPTER II. LIMITATIONS.

ARTICLE 3.

Limitations, General Provisions.

§ **1-14**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-15. Statute runs from accrual of action.**—Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute. (C. C. P., 17; Code, s. 138; Rev., s. 360; C. S., s. 405; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment, effective July 1, 1969, deleted the former last sentence, which read "The objection that the action was not commenced within the time limited can only be taken by answer."

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Rule 12 of the Rules of Civil Procedure (§ 1A-1) provides how defenses and objections may be raised.

For case law survey as to replies and pleadings of statute of limitations, see 45 N.C.L. Rev. 829 (1967).

When the statute starts to run, it continues until stopped by appropriate judicial process. Speas v. Ford, 253 N.C. 770, 117 S.E.2d 784 (1961); B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

In general a cause of action accrues as soon as the right to institute and maintain a suit arises. Thurston Motor Lines, Inc. v. General Motors Corp., 258 N.C. 323, 128 S.E.2d 413 (1962).

A cause of action generally accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. In no event can a statute of limitations begin to run until plaintiff is entitled to institute action. City of Reidsville v. Burton, 269 N.C. 206, 152 S.E.2d 147 (1967).

Cause of Action for Negligent Injury Ordinarily Accrues When Wrong Committed.—Unless tolled by disability or the fraudulent concealment of the cause of action, a cause of action for negligent injury ordinarily accrues when the wrong is committed giving rise to the right to suit, even though the damages at that time be nominal and without regard to the time when consequential injuries are discovered or should have been discovered. Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957).

Necessity of Pleading Statute.—

Unless a statute of limitations is annexed to the cause of action itself, the bar of limitation must be affirmatively pleaded in order to be available as a defense. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

A statute of limitations is not available as a defense or bar to an action unless pleaded, nor can it be raised, ordinarily, by motion to dismiss. Iredell County v. Crawford, 262 N.C. 720, 138 S.E.2d 539 (1964).

Manner of Pleading.—

Statutes of limitation cannot be taken advantage of by demurrer but only by answer. Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952); Reid v. Holden, 242 N.C. 408, 88 S.E.2d 125 (1955); Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959); Iredell County v. Crawford, 262 N.C. 720, 138 S.E.2d 539 (1964).

The contention that an amendment constituting a new cause of action was filed after the bar of the statute of limitations was complete cannot be raised by demurrer or motion to strike, but can be presented only by answer. Stamey v. Rutherfordton Electric Membership Corp., 249 N.C. 90, 105 S.E.2d 282 (1958).

Where petitioner alleged that the petitioner "in apt time and in proper manner, filed her dissent from said will." and the answer "denied" this allegation, the petitioner's allegation was a mere conclusion and respondent's general denial was not affirmative pleading. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

Accrual of Cause Illustrated.—

Where plaintiff alleged that a truck-tractor was equipped with a faulty and dangerous carburetor. likely to cause said truck-tractor to be "ignited with fire," when sold and delivered to plaintiff, and that defendants knew or by the exercise of due care should have known of such defective condition, and failed to warn plaintiff thereof. plaintiff suffered injury and his rights were invaded immediately upon the sale and delivery of the truck-tractor to plaintiff, and a cause of action in favor of plaintiff and against defendants then accrued for which plaintiff was entitled to recover nominal damages at least. Thurston Motor Lines, Inc. v General Motors Corp., 258 N.C. 323, 128 S.E.2d 413 (1962).

In an action instituted to recover damages resulting from dust and dirt injected into plaintiffs' house by a gas furnace and air conditioner purchased from defendant, plaintiffs' allegations were to the effect that the defect was obvious from the beginning, that complaints were made to defendant, and that defendant's employees reported no defect could be found in the system but that they would continue to look. It was held that plaintiffs' cause of action accrued upon the occurrence of the first damage, and plaintiffs were not entitled to rely upon estoppel of defendant to plead the statute, since defendant consistently took the position that no defect existed and never made any representation that would have led plaintiffs to refrain from suing. Matthieu v. Piedmont Natural Gas Co., 269 N.C. 212, 152 S.E.2d 336 (1967).

When Statute Begins to Run against Remainderman.—Ordinarily the statute of limitations does not begin to run against the rights of a remainderman to maintain an action to recover possession of land until after the expiration of the life estate. However, a remainderman is not required to wait until after the expiration of the life estate to bring an action to quiet title or otherwise protect his interest Walston v. Applewhite & Co., 237 N.C. 419, 75 S.E.2d 138 (1953).

Continuing or Recurring Damages.—When the basis of the cause of action produces continuing or recurring damages, the cause of action accrues at the time damages are first sustained, the subsequent damages being merely in aggravation of the original damages and not being essential to the cause of action. Matthieu v. Piedmont Natural Gas Co., 269 N.C. 212, 152 S.E.2d 336 (1967).

"Special Cases" Where Different Limitation Prescribed.—The only "special case" in respect to torts "where a different limitation is prescribed by statute" is contained in the three-year statute, G S 1-52 This "different limitation" relates only to actions grounded on allegations of fraud or mistake. Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952).

A cause of action accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. This rule is subject to certain exceptions, such as torts grounded on fraud or mistake. Matthieu v. Piedmont Natural Gas Co., 269 N.C. 212, 152 S.E.2d 336 (1967).

In an action to recover payments made under a contract to sell realty, no question of the statute of limitations arises where the provisions of § 1-52 were not pleaded. Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967).

Mere Lack of Knowledge Does Not Postpone Running of Statute.—Mere lack of knowledge of the facts constituting a cause of action in tort, in the absence of fraudulent concealment of facts by the tortfeasor, does not postpone the running of the statute. Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952).

A cause of action for malpractice based on the surgeon's negligence in leaving a foreign object in the body at the conclusion of an operation, accrues immediately upon the closing of the incision, and such action may not be maintained more than three years thereafter even though the consequential damage from such negligence is not discovered until sometime after the operation. Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957).

Where there is no evidence that a surgeon attempted to conceal from his patient the fact that a foreign substance had been left in the patient's body at the conclusion of the operation, but to the contrary that the surgeon frankly disclosed the facts upon their ascertainment by X-ray less than two years after the operation, nonsuit is properly entered in an action for malpractice instituted more than three years after the operation, here being no evidence of fraudulent concealment. Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957).

Evidence held to negate fraudulent concealment of cause of action against surgeon for technical assault in performing an operation beyond the scope of the one authorized. Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952).

Applied in Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783 (1953), (con. op.).

Cited in J. G. Dudley Co. v. Commissioner of Internal Revenue, 298 F.2d 750 (1962).

§ 1-16: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-17 Disabilities.

Application to Limitation on Widow's Right to Dissent from Husband's Will.—See note to § 30-1.

Disability Subsequent to Commencement of Running of Statute.—Where the statute of limitations begins to run in favor of one in adverse possession against an owner who dies leaving heirs who are minors, their disability of infancy does not affect the operation of the statute, since the disability is subsequent to the commencement of the running of the statute. Battle v. Battle, 235 N.C. 499, 70 S.E.2d 492 (1952).

Effect of Guardian Having Right to Sue.—

The statute of limitations begins to run against an infant or an insane person who is represented by a guardian at the time the cause of action accrues. First-Citizens Bank & Trust Co. v. Willis, 257 N.C. 59, 125 S.E.2d 359 (1962).

It is the rule in this State that, except in suits for realty where the legal title is in the ward, the statute of limitations begins to run against an infant who is represented by a general guardian as to any action which the guardian could or should bring at the time the cause of action accrues. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

If an infant or insane person has no guardian at the time the cause of action accrues, then the statute begins to run upon the appointment of a guardian or upon the removal of his disability as provided by this section, whichever shall occur first. First-Citizens Bank & Trust Co. v. Willis, 257 N.C. 59, 125 S.E.2d 359 (1962); Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Action on Judgment Secured during Infancy.—This section permits one to bring an action on a judgment secured during his infancy by a next friend within the time limited by § 1-47 (1), i.e., ten years after he becomes twenty-one years old. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Quoted in Rowland v. Beauchamp, 253 N.C. 231, 116 S.E.2d 720 (1960).

Stated in Franklin County v. Jones, 245 N.C. 272, 95 S.E.2d 863 (1957).

Cited in Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957); Jewell v. Price, 264 N.C. 459, 142 S.E.2d 1 (1965).

§ 1-20. Disability must exist when right of action accrues.

Running of Statute Cannot Be Stopped.—Once the statute begins to run nothing stops it. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Cited in Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957).

§ 1-21. Defendant out of State; when action begun or judgment enforced.—If when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the State, action may be commenced, or judgment enforced within the times herein limited after the return of the person into this State, and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and resides out of this State, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action or the enforcement of the judgment. Provided, that where a cause of action arose outside of this State and is barred by the laws of the jurisdiction in which it arose, no action may be maintained in the courts of this State for the enforcement thereof, except where the cause of action originally accrued in favor of a resident of this State. (C. C. P., s. 41; 1881, c. 258, ss. 1, 2; Code, s. 162; Rev., s. 366; C. S., s. 411, 1955, c. 544.)

Editor's Note.—The 1955 amendment added the proviso at the end of the section.

For brief comment on the 1955 amendment, see 33 N C Law Rev 531.

For case law survey as to the North Carolina "borrowing statute," see 45 N.C.L. Rev. 845 (1967).

The general purpose of this section, etc.—

The purpose of this section is to prevent defendants from having the benefit of the statute of limitation while they permit debts against them, past due, to remain unpaid, or other causes of action against them to remain undischarged, and keep beyond the limits of the State and the jurisdiction of its courts, and thus prevent the person having the right to sue from doing so. Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783 (1953).

The words "any person," etc.—

In accord with original. See Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783 (1953).

The legislature intended the proviso added by the 1955 amendment to be a limited borrowing statute, operating to bar the prosecution in this State of all claims barred either in the state of their origin, or in this State. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

It Is Not Limitation on Tolling Provisions of Section.—The proviso in this section is not a limitation upon the tolling provisions of the statute but is a limited borrowing statute, operating to bar the prosecution in this State of all claims barred either in the state of their origin or in this State. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

The 1955 amendment was designed (1) to clarify the law, and (2) to bar stale out-of-state claims. To treat the proviso merely as a limitation on the tolling portion of the statute would accomplish neither of these purposes. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

Nonresident May Litigate Here Claim Not Barred Where It Arose.—The courts of this State are open to a nonresident plaintiff to enforce a claim on a cause of action that is not barred in the jurisdiction where such cause of action arose, where the debtor has not been a resident of this State for the statutory time necessary to bar the action. This section tolls the statute in such cases where neither the plaintiff nor the defendant is a resident of this State at the time of the institution of the action and never was, as well as in cases where the obligation arose out of the State and the debtor has not resided in the State for a time sufficient to bar the action by the law of this State. Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783 (1953) (decided prior to addition of proviso in 1955).

But Proviso Bars All Stale Foreign Claims.—Giving the language of the proviso its ordinary meaning, it is a limited borrowing statute which bars all stale foreign claims. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

If the proviso be treated as a limited borrowing statute, no action barred in the state of origin may be litigated here. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

Unless They Originally Accrued in Favor of Resident.—This section now bars all stale foreign claims unless they originally accrued in favor of a resident of North Carolina. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

And Ancillary Administrator Is Not Resident to Whom Wrongful Death Claim Accrues. — The fact that an action for wrongful death is brought by an ancillary administrator appointed in this State does not constitute the action one accruing to a resident of this State within the meaning of the proviso to this section. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

Hence, Wrongful Death Claim Barred Where It Arose Is Barred Here.—Where at the time a wrongful death action was instituted here, it was barred in Pennsylvania where it arose, it is also barred in North Carolina. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

Action Based on Foreign Statute Which Itself Contains Limitation.—When an action is based on a foreign statute which creates a cause or right of action and the statute itself contains a limitation on the time within which the action can be brought, the life of the right of action is limited by that provision and not by the local statutes of limitation. Rios v. Drennan 209 F Supp. 927 (1962).

§ 1-22. Death before limitation expires; action by or against executor.

I GENERAL CONSIDERATION.

Exception to General Rule.—

The general rule is unquestionably that when the statute of limitations once begins to run nothing stops it But this section has made an exception where a party dies. Hodge v. Perry, 255 N.C. 695, 122 S.E.2d 677 (1961).

III. DEATH OF THE DEBTOR.

Running Suspended until Qualification of Administrator.—Where a claim is not barred at the time of the debtor's death, the death suspends the running of the statute until the qualification of an administrator. Prentzas v. Prentzas, 260 N.C. 101, 131 S.E.2d 678 (1963).

And Creditor Has One Year Thereafter to Bring Suit.—The creditor has one year from the date of the appointment of the administrator within which to bring suit. Prentzas v. Prentzas, 260 N.C. 101, 131 S.E.2d 678 (1963).

§ 1-23. Time of stay by injunction or prohibition.

Cited in High v. Broadnax, 271 N.C. 313, 156 S.E.2d 282 (1967).

§ 1-24. Time during controversy on probate of will or granting letters.

This section has no application where an administrator has been appointed. Hargrave v. Gardner, 264 N.C. 117, 141 S.E.2d 36 (1965).

§ 1-25: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-26. New promise must be in writing.

I. GENERAL CONSIDERATION

Editor's Note.—The legislature rewrote § 1-27 by the 1953 amendment to that section As rewritten, § 1-27 in effect reverses Green v Greensboro Female College. 83 N C. 449 (1880), noted in the recompiled volume under this and other sections, and the cases which have applied the law as there declared. A payment by a joint obligor does not now fix the date of such acknowledgment or payment as a new date from which the statute begins to run, except as to him, unless such payment is authorized or ratified. See Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

For comment on application of statute of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965).

II. ACKNOWLEDGMENT OR NEW PROMISE.

A new promise to pay fixes a new date from which the statute of limitations runs, but such promise, to be binding, must be in writing as required by this section Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

III. PART PAYMENT.

Same—Principal and Surety.—A principal and surety are joint or co-obligors A written acknowledgment or payment by one is binding on the other Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960). But see Editor's Note above.

§ 1 27 Act, admission or acknowledgment by party to obligation, co-obligor or guarantor.—(a) After a cause of action has accrued on any obligation on which there is more than one obligor, any act, admission, or acknowledgment by any party to such obligation or guarantor thereof, which removes the bar of the statute of limitations or causes the statute to begin running anew, has such effect only as to the party doing such act or making such admission or acknowledgment, and shall not renew, extend or in any manner impose liability of any kind against other parties to such obligation who have not authorized or ratified the same.

(b) Nothing in this section shall be construed as applying to or affecting rights or obligations of partnerships or individual members thereof, due to acts, admissions or acknowledgments of any one partner but rights as between partners shall be governed by G. S. 59-39.1 (C. C. P., s. 50; Code, s. 171; Rev., s. 372, C. S. s. 417, 1953, c. 1076, s. 1.)

Editor's Note. — The 1953 amendment, effective July 1, 1953, rewrote this section. For comment on admendment, see 31 N.C.L. Rev. 397.

The legislature rewrote this section by the 1953 amendment. As rewritten, this section in effect reverses Green v. Greensboro Female College, 83 N.C. 449 (1880), noted in the recompiled volume under this and other sections, and the cases which have applied the law as there declared. A payment by a joint obligor does not now fix the date of such acknowledgment or payment as a new date from which the statute begins to run, except as to him, unless such payment is authorized or ratified. See Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

For comment on application of statute of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965).

Section Changed Law.—

The correct citation to Green v. Greensboro Female College, cited in the second paragraph under this catchline in the recompiled volume, is 83 N.C. 449 (1880).

Partial Payment Prior to Dissolution or Bar.—

The correct citation to Green v. Greensboro Female College, cited in the second paragraph under this catchline in the recompiled volume, is 83 N.C. 449 (1880).

§ 1-30. Applicable to actions by State.

Cited in City of Reidsville v. Burton, 269 N.C. 206, 152 S.E.2d 147 (1967).

ARTICLE 4.

Limitations, Real Property.

§ 1-35. Title against State.

The requirement that possession must be hostile in order to ripen title by adverse possession does not import ill will or animosity, but only that the one in possession of the lands claims the exclusive right thereto. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

Adverse possession consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

Title Limited to Land Actually Occupied.—An adverse possessor of land without color of title cannot acquire title to any greater amount of land than that which he has actually occupied for the statutory period. He cannot enlarge his rights beyond the limits of his actual possession by a claim of title to other land abutting that which he actually occupies, even though such other land may be defined by marked boundaries. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

The reason for the rule restricting one who holds adversely without color of title to the amount of land actually occupied by him was well stated as follows: But the question is, what is possession for that purpose? Plainly, it must be actual possession and enjoyment. It is true, indeed, that if one enters into land under a deed or will, the entry is into the whole tract described in the conveyance, prima facie, and is so deemed in realty, unless some other person has possession of a part, either actually or by virtue of the title. But when one enters on land, without any conveyance, or other thing, to show what he claims, how can the possession by any presumption or implication be extended beyond his occupation de facto? To allow him to say that he claims to certain boundaries beyond his occupation, and by construction to hold his possession to be commensurate with the claim, would be to hold the ouster of the owner without giving him an action therefor. One cannot thus make in himself a possession, contrary to the fact. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

Burden of Proof. — The party asserting title by adverse possession must carry the burden of proof on that issue. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

Description Must Be Fitted to Land's Surface.—Those having the burden of proof must locate the land they claim title to by fitting the description contained in the paper-writing offered as evidence of title to the land's surface. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

The listing and paying of taxes on the locus in quo claimed by defendant would be competent in evidence to show that their possession was adverse and in the character of owner. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

Use of Land for Grazing. — One cannot gain title by adverse possession to unenclosed land by using it for grazing where others made similar use of the land during the statutory period, even without his consent, since his possession is not exclusive. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

Cited in United States v. Burnette, 103 F. Supp. 645 (W.D.N.C. 1952).

§ 1-36. Title presumed out of State.

Purpose of Section.—

In accord with 1st paragraph in original. See Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952); McDonald v. McCrummen, 235 N.C. 550, 70 S.E.2d 703 (1952); Powell v. Mills, 237 N.C. 582, 75 S.E.2d 759 (1953).

It is not necessary to prove that the sovereign has parted with its title when it is not a party to the action. Cothran v. Akers Motor Lines, Inc., 257 N.C. 782, 127 S.E.2d 578 (1962).

No Presumption in Favor of One Party or the Other.—Under this section, in all actions involving title to real property title is conclusively presumed to be out of the State unless it be a party to the action, but there is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself. Locklear v. Oxendine, 233 N.C. 710, 65 S.E.2d 673 (1951); Norman v. Williams, 241 N.C. 732, 86 S.E.2d 593 (1955); Scott v. Lewis, 246 N.C. 298, 98 S.E.2d 294 (1957); Tripp v. Keais, 255 N.C. 404, 121 S.E.2d 596 (1961).

Applied in Sessoms v. McDonald, 237 N.C. 720, 75 S.E.2d 904 (1953).

Cited in Shingleton v. North Carolina Wildlife Resources Comm'n, 248 N.C. 89, 102 S.E.2d 402 (1958).

§ 1-37. Such possession valid against claimants under State.

Cited in United States v. Burnette, 103 F. Supp. 645 (W.D.N.C. 1952).

§ 1-38. Seven years possession under color of title.—When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under color of title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same, except during the seven years next after his right or title has descended or accrued, who in default of suing within that time shall be excluded from any claim thereafter made; and such possession, so held, is a perpetual bar against all persons not under disability: Provided, that commissioner's deeds in judicial sales and trustee's deeds under foreclosure shall also constitute color of title. (C. C. P., s. 20; Code, s. 141; Rev., s. 382; C. S., s. 428; 1963, c. 1132.)

I. GENERAL NOTE ON ADVERSE POSSESSION

A. General Consideration.

Editor's Note.—

The 1963 amendment added the proviso at the end of the section.

For note on intent as a requisite in mistaken boundary cases, see 33 N.C. Law Rev. 632. For note on tax foreclosure deed to property held by tenants in common as color of title, see 36 N.C. L. Rev. 526.

Definition.—

In accord with original. See Mallet v. Huske, 262 N.C. 177, 136 S.E.2d 553 (1964).

There must be known and visible boundaries, etc.—

In accord with original. See McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

Hostile Act Does Not Start Running of Statute against Owner in Possession.—In determining when the owner of real estate must assert his rights against an adverse claim, the rule is that an owner in possession is not required to take notice of a hostile claim Accordingly, the hostile act or claim of a person not in possession ordinarily does not start the statute of limitations to running against an owner in possession and occupancy The foregoing rule applies to an equitable owner in possession of land, and so long as he retains possession, nothing else appearing, the statute of limitations does not run against him Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

Effect of Holding Portion of Land, etc.—

In accord with original. See Wachovia Bank & Trust Co. v. Miller, 243 N.C. 1, 89 SE.2d 765 (1955).

When one enters into possession under colorable title which describes the land by definite lines and boundaries, his possession is extended, by operation of law, to the outer boundaries of his deed. But where two or more adjoining tracts of land are conveyed in one deed, or in separate deeds, by separate and distinct descriptions, the actual possession by grantee of one of the tracts for seven years is not constructively extended to the other tract or tracts so as to ripen title thereto by adverse possession. Morehead v. Harris, 262 N.C. 330, 137 S.E.2d 174 (1964).

Proof of intermittent acts of trespass is not sufficient to overrule a motion to nonsuit upon the issue of adverse possession. Price v. Tomrich Corp., 3 N.C. App. 402, 165 S.E.2d 22 (1969).

Color of Title Affords No Protection Where Requisites of Adverse Possession Are Not Present.—A deed, which is color of title, does not draw to the grantee-occupant of the land described therein the protection of the statute of limitations where the requisites of adverse possession are not present. Morehead v. Harris, 262 N.C. 330, 137 S.E.2d 174 (1964).

Instrument as Color of Title to Land Not Conveyed. — The fact that an instrument passes title to a part of the land embraced in its description does not prevent it from being color of title to that part to which it does not convey good title but which is embraced within its description. Price v. Tomrich Corp., 3 N.C. App. 402, 165 S.E.2d 22 (1969).

Where the title deeds of two rival claimants lap, etc.—

In accord with 1st paragraph in original. See Price v. Tomrich Corp., 3 N.C. App. 402, 165 S.E.2d 22 (1969).

If the party claiming under the senior title is not in possession of any part of the lappage and his adversary has been in actual possession of a part under a deed which defines his boundaries and is color of title, the law extends his possession to the whole of the lappage, and if he retains the possession for the time required by the statute, seven years, and it is adverse, it will bar the right of entry of the other party and defeat his recovery. Price v. Tomrich Corp., 3 N.C. App. 402, 165 S.E.2d 22 (1969).

Generally speaking, a claim of title by adverse possession must be pleaded under North Carolina law. United States v. Chatham, 208 F. Supp. 220 (W.D.N.C. 1962).

But This Applies Only When Adverse Possession Is Set Up as Defense.—The requirement that a claim of title by adverse possession must be pleaded applies only when adverse possession is set up as a defense to an action. United States v. Chatham, 208 F. Supp. 220 (W.D.N.C. 1962).

And Not Where Claim Is Based on Adverse Possession under Color of Title.— The requirement that a claim of adverse possession must be pleaded does not apply when a claim of title is based upon adverse possession under color of title. United States v. Chatham, 208 F. Supp. 220 (W.D.N.C. 1962).

Plea Raises Issue of Fact upon Which Defendant Has Burden of Proof.—Where plaintiff in an action to quiet title establishes a prima facie case, defendant's plea of title by adverse possession under color for seven years does not justify nonsuit of plaintiff's cause, since the plea of adverse possession raises an issue of fact for the jury upon which defendant has the burden of proof. Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953).

Mere Admission of Possession Does Not Amount to Admission of Adverse Possession.—Plaintiff's admission that he gave a certain person possession more than seven years prior to the institution of the action does not justify nonsuit of plaintiff's cause of action to quiet title, since mere admission of possession, without evidence in respect to the nature or character of such possession, does not amount to an admission of adverse possession in law, even if defendant be given the benefit of presumptions arising from mesne conveyances from such person. Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953).

Plea of Statute as Plea in Bar to Preclude Reference. — See note to § 1-189, analysis line II.

B Character of Possession

Must Be Actual.—

Adverse possession means actual possession, with an intent to hold solely for the possessor to the exclusion of others and is denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible, such acts to be so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser. Price v. Tomrich Corp., 3 N.C. App. 402, 165 S.E.2d 22 (1969).

Mere possession does not necessarily amount to adverse possession in law Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953).

Possession Must Be Actual, Open, Visible, Notorious, Continuous and Hostile.—Under either § 1-38 or § 1-40, in order to bar the true owner of land from recovering it from an occupant in adverse possession, the possession relied on must have been actual, open, visible, notorious, continuous, and hostile to the true owner's title and to all persons, for the full statutory period Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953).

To convert the shadow of color of title into perfect title, possession must be continuous, open notorious as well as adverse. It must be of such character as to put the true owner on notice of the adverse claim. It must suffice to subject the occupant to an action in ejectment as distinguished from a mere trespass quare clausum fregit. Bowers v. Mitchell, 258 N.C. 80, 128 S.E.2d 6 (1962).

Sufficiency of Possession—Test for Determining Sufficiency.—

A possession that ripens into title must be such as continually subjects some portion of the disputed land to the only use of which it is susceptible, or it must be an actual and continuous occupation of a house or the cultivation of a field, however small, according to the usages of husbandry. The test is involved in the question whether the acts of ownership were such as to subject the claimant continually during the whole statutory period to an action in the nature of trespass in ejectment instead of to one or several actions of trespass quare clausum fregit for damages. Mallet v. Huske, 262 N.C. 177, 136 S.E.2d 553 (1964), citing Shaffer v. Gaynor. 117 N.C. 15. 23 S.E. 154 (1895).

Same—Payment of Taxes.—

The listing and payment of taxes would not suffice to support an action in ejectment or trespass which is the test of possession referred to in §§ 1-38 and 1-40. Chisholm v. Hall, 255 N.C. 374, 121 S.E.2d 726 (1961).

That defendants listed and paid the taxes is evidence of the character of their claim, but it is no evidence of actual possession. Chisholm v. Hall, 255 N.C. 374, 121 S.E.2d 726 (1961).

Continuity and Duration.—

Continuity of possession being one of the essential elements of adverse possession. in order that title may be ripened thereby. such possession must be shown to have been continuous and uninterrupted for the full statutory period This for the reason that if the possession of the adverse claimant be broken. the constructive possession of the true owner intervenes and destroys the effectiveness of the prior possession. Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953).

Evidence of continuous possession by using the land for the purposes for which it was ordinarily susceptible, even though such acts were seasonal or intermittent, is sufficient. Price v. Tomrich Corp., 3 N.C. App. 402, 165 S.E.2d 22 (1969).

Occasional acts of ownership, no matter how adverse, do not constitute a possession that will mature title Sessoms v McDonald, 237 N.C. 720, 75 S.E.2d 904 (1953).

Tacking Possession—Privity.—

The principle prevails in this State that several successive possessions may be tacked for the purpose of showing a continuous adverse possession where there is privity of estate or connection of title between several successive occupants Scott v. Lewis, 246 N.C. 298, 98 S.E.2d 294 (1957).

In order to fulfill the requirements as to continuity of possession, it is not necessary that an adverse possession be maintained for the entire statutory period by one person. Continuity may be shown by the tacking of successive possessions of two or more persons between whom the requisite privity exists. The privity referred to is only that of possession and may be said to exist whenever one holds the property under or for another or in subordination to his claim and under an agreement or arrangement recognized as valid between themselves. Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953).

Where parties bring action for the recovery of land as heirs at law of their ancestor and judgment is rendered in the action adverse to them, such judgment adjudicates want of title in their ancestor and is binding upon them, and they may not in a subsequent action, in which they assert title by adverse possession, tack the possession of their ancestor or contend that their separate acts of ownership were done in the character of heirs at law claiming under the known and definite boundaries. Scott v. Lewis, 246 N.C. 298, 98 S.E.2d 294 (1957).

A grantee claiming land within the boundaries called for in the deed or other instrument constituting color of title, may tack his grantor's possession of such land to his own for the purpose of establishing adverse possession for the requisite statutory period. Similarly, the adverse possession of an ancestor may be cast by descent upon his heirs and tacked to their possession for the purpose of showing title by adverse possession. Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953).

A deed does not of itself create privity between the grantor and the grantee as to land not described in the deed but occupied by the grantor in connection therewith, and this is so even though the grantee enters into possession of the land not described and uses it in connection with that conveyed. Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953).

For note on tacking successive adverse possessions of a strip of land not included in a deed, see 31 N.C.L. Rev. 478 (1953).

Where an heir goes into adverse possession of a tract of land, but the ancestor dies before such possession has been held for twenty years, such possession prior to the ancestor's death may not be tacked to the heir's possession subsequent to the ancestor's death, and such heir's possession for less than twenty years subsequent to the ancestor's death does not ripen title in him. Wilson v. Wilson, 237 N.C. 266, 74 S.E.2d 704 (1953).

Possession of a single tract is not constructively extended to a separate and distinct tract even though both tracts are described in the same conveyance. Bowers v. Mitchell, 258 N.C. 80, 128 S.E.2d 6 (1962).

Conflicting evidence as to the character or extent of the possession under color of title by adverse possession raises the issue for the determination of the jury. Bumgarner v. Corpening, 246 N.C. 40, 97 S.E.2d 427 (1957).

II. NOTE TO SECTION 1-38.

Section Applies to State and Its Agencies.—The General Assembly intended that this section and § 1-40 should apply to any legal entity, including the State of North Carolina and its agencies, capable of adversely possessing land and of acquiring title thereto. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966), commented on in 45 N.C.L. Rev. 964 (1967).

Methods of Proving Title.—Plaintiffs, in order to recover, had the burden of proving their title to the disputed area by any one of the various methods set out in Mobley v. Griffin, 104 N.C. 112, 10 S.E. 142 (1889). Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

The identity or location of the land may be shown by documentary evidence, such as plats, surveys, and field notes. A map made by a surveyor of the premises sued for and of other tracts adjacent thereto, when proved to be correct, is admissible to illustrate other testimony in the case and throw light on the location of the land in controversy; and a draft of a survey, proved to be correct, is admissible in evidence as explanatory of what the surveyor testified he had done in making the survey. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Contentions of All Parties Should Be Shown on One Map.—It is highly desirable in the trial of a lawsuit involving the location of disputed boundary lines to have one map showing thereon the contentions of all the parties. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Proof Where Allegations as to Title and Trespass Are Denied.—In an action for the recovery of land and for trespass thereon, where the allegations of plaintiffs as to their title and the trespass of the defendant are denied, it was then incumbent upon plaintiffs to establish both the issue of ownership and the issue of trespass. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Allegations as to title having been denied, it was incumbent upon plaintiffs to establish both ownership and trespass. Whether relying upon their deeds as proof of title or of color of title, they were required to locate the land by fitting the description in the deeds to the earth's surface. In the absence of title or color of title, they were required to establish the known and visible lines and boundaries of the land actually occupied for the statutory period. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Section Is Proper Plea in Bar to Action in Ejectment. — Generally, when pleaded, this section is a proper plea in bar to an action in ejectment. Scott Poultry Co. v. Bryan Oil Co., 272 N.C. 16, 157 S.E.2d 693 (1967).

Evidence Required in Action of Ejectment.—In an ejectment action a plaintiff must offer evidence which fits the description contained in his deeds to the land claimed. That is, he must show that the very deeds upon which he relies convey, or the descriptions therein contained embrace within their bounds, the identical lands in controversy. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Adverse possession, to ripen into title after seven years, must be under color, otherwise a period of twenty years is required under § 1-40. Justice v. Mitchell, 238 N.C. 364, 78 S.E.2d 122 (1953).

Where adverse possession is under color of title seven years holding can secure a fee. Williams v. Weyerhaeuser Co., 378 F.2d 7 (4th Cir. 1967).

The possession has to be under color of title. United States v. Chatham, 208 F. Supp. 220 (W.D.N.C. 1962).

Twenty-Year Limitation Applies to Holding without Color.—Where defendant in a quia timet suit defends on grounds other than adverse possession, the statutory period of holding is twenty years where without color of title. Williams v. Weyerhaeuser Co., 378 F.2d 7 (4th Cir. 1967).

Color of Title Defined. — Color of title is a paper writing which purports to convey land but fails to do so. First-Citizens Bank & Trust Co. v. Parker, 235 N.C. 326, 69 S.E.2d 841 (1952); Carrow v. Davis, 248 N.C. 740, 105 S.E.2d 60 (1958).

Sufficiency of Paper to Constitute Color.—

If the instrument on its face purports to convey land by definite lines and boundaries and the grantee enters into possession claiming under it and holds adversely for seven years, it is sufficient to vest title to the land in the grantee. No exclusive importance is to be attached to the ground of the invalidity of the colorable title if entry thereunder has been made in good faith and possession held adversely. Though the grantor may have been incompetent to convey the true title or the form of conveyance be defective, it will constitute color of title which will draw to the possession of the grantee thereunder the protection of the statute. First Citizens Bank & Trust Co. v. Parker, 235 N.C. 326, 69 S.E.2d 841 (1952); Johnson v. McLamb, 247 N.C. 534, 101 S.E.2d 311 (1958).

Same—Valid Deed.—A valid deed is not color of title. When one gives a deed for lands for a valuable consideration, and the grantee fails to register it, but enters into possession thereunder and remains therein for more than seven years, such deed does not constitute color of title. Justice v. Mitchell, 238 N.C. 364, 78 S.E.2d 122 (1953).

Same—Fraudulent Deed.—A fraudulent deed may be color of title and become a good title if the fraudulent grantee holds actual adverse possession for the statutory period against the owner who has right of action to recover possession and is under no disability. First-Citizens Bank & Trust Co. v. Parker, 235 N.C. 326, 69 S.E.2d 841 (1952); Johnson v. McLamb, 247 N.C. 534, 101 S.E.2d 311 (1958).

Same—Deed Made in Defective Partition Proceedings.—Where in a partition proceeding to sell land less than the whole number of tenants in common have been made parties, a deed made pursuant to an order of court to the purchaser is color of title and seven years adverse possession thereunder will bar those tenants in common who were not made parties. First-Citizens Bank & Trust Co. v. Parker, 235 N.C. 326, 69 S.E.2d 841 (1952); Johnson v. McLamb, 247 N.C. 534, 101 S.E.2d 311 (1958).

Where a sale is made pursuant to court order in a partition proceeding and some of the cotenants are not parties, or there is an actual partition among those parties, the deed or the decree of partition is not the act of a cotenant, but is the act of a stranger, and seven years' possession under the deed or decree confirming the partition suffices to ripen title. Yow v. Armstrong, 260 N.C. 287, 132 S.E.2d 620 (1963).

Same — Commissioner's Deed in Tax Foreclosure Proceedings. — Commissioner's deed in tax foreclosure proceedings instituted against one tenant in common is color of title as against the cotenants who were not parties to the foreclosure. Johnson v. McLamb, 247 N.C. 534, 101 S.E.2d 311 (1958).

Same—Decree in Condemnation.—A decree in condemnation was color of title, and the adverse possession of the United States of America under this decree of condemnation under known and visible boundaries for a period of seven years as required by this section was sufficient to cure any defects in the title conveyed by the decree of condemnation. United States v. Chatham, 208 F. Supp. 220 (W.D.N.C. 1962).

Same — Description of Property Involved.—A deed offered as color of title is such only for the land designated and described in it. Davidson v. Arledge, 88 N.C. 326 (1883); Smith v. Fite, 92 N.C. 319 (1885); Barker v. Southern Ry., 125 N.C. 596, 34 S.E. 701 (1899); Johnston v. Case, 131 N.C. 491, 42 S.E. 957 (1902); Smith v.

Benson, 227 N.C. 56, 40 S.E.2d 451 (1946); Locklear v. Oxendine, 233 N.C. 710, 65 S.E.2d 673 (1951); Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952); Powell v. Mills, 237 N.C. 582, 75 S.E.2d 759 (1953); Norman v. Williams, 241 N.C. 732, 86 S.E.2d 593 (1955); McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

And the description in the deed must by proof be made to fit the land it covers. Smith v. Benson, 227 N.C. 56, 40 S.E.2d 451 (1946); Locklear v. Oxendine, 233 N.C. 710, 65 S.E.2d 673 (1951); Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952); Powell v. Mills, 237 N.C. 582, 75 S.E.2d 759 (1953); McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965). See the headnote to Smith v. Fite, 92 N.C. 319 (1885), quoted or stated in each of the foregoing cases: "Where a party introduces a deed in evidence, which he intends to be used as color of title, he must prove that its boundaries cover the land in dispute, to give legal efficacy to his possession."

Therefore, a deed which is inoperative because the land intended to be conveyed is incapable of identification from the description therein is inoperative as color of title. Dickens v. Barnes, 79 N.C. 490 (1878); Barker v. Southern Ry., 125 N.C. 596, 34 S.E. 701 (1899); Fincannon v. Sudderth, 144 N.C. 587, 57 S.E. 337 (1907); Katz v. Daughtrey, 198 N.C. 393, 151 S.E. 879 (1930); Thomas v. Hipp, 223 N.C. 515, 27 S.E.2d 528 (1943); Powell v. Mills, 237 N.C. 582, 75 S.E.2d 759 (1953); Carrow v. Davis, 248 N.C. 740, 105 S.E.2d 60 (1958).

A deed cannot be color of title to land in general, but must attach to some particular tract. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

To constitute color of title a deed must contain a description identifying the land or referring to something that will identify it with certainty. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

When a party introduces a deed in evidence which he intends to use as color of title, he must not only offer the deed upon which he relies for color of title, he must by proof fit the description in the deed to the land it covers—in accordance with appropriate law relating to course and distance, and natural objects and other monuments called for in the deed. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

Same—Deed from Purchase of Land at Mortgage Foreclosure Sale. — A deed obtained from the purchase of land at a mortgage foreclosure sale constitutes color of title, even though the foreclosure sale was defective or void. Scott Poultry Co. v. Bryan Oil Co., 272 N.C. 16, 157 S.E.2d 693 (1967).

Color of Title Does Not Relate Back to Time of Entry.—Though a person originally entering without color of title may on subsequent acquisition of color be deemed to have held adversely under color from the latter date, still his color of title does not relate back to the time of his entry Justice v. Mitchell, 237 N.C. 364, 78 S.E.2d 122 (1953).

Where the only color of title set up in the complaint is a deed executed less than seven years before the institution of the action, the complaint does not state a cause of action for the acquisition of title by adverse possession under color of title Washington v. McLawhorn, 237 N.C. 449, 75 S.E.2d 402 (1953).

Description in Deed Enlarged in Subsequent Deeds in Chain of Title.—Where the description in the deed from the common source of title is enlarged in descriptions in subsequent deeds in the chain of title, the party claiming the additional land by adverse possession under color of title must show actual possession of the additional land, since possession under the deed from the common source could not be constructively extended to include the additional land. Bumgarner v Corpening, 246 N.C. 40, 97 S.E.2d 427 (1957).

Where the parties claim under deeds from a common source calling for a road as the dividing line between the tracts, but subsequent deeds in the chain of title of respondents describe the land by specific description without reference to the road, respondents are entitled to claim the land encompassed in the description in the intermediate deeds as under color of title, and when they offer evidence of adverse possession under their deeds, an instruction limiting their claim to the road as it existed at the time of the execution of the deeds from the common source, is error Bumgarner v Corpening, 246 N.C. 40, 97 S.E.2d 427 (1957).

Color of title is not sufficient to make a prima facie case of title Cothran v. Akers Motor Lines, Inc., 257 N.C. 782, 127 S.E.2d 578 (1962).

But Must Be Strengthened by Possession.—The color must be strengthened by possession, which must be open, notorious, and adverse for a period of seven years. Cothran v Akers Motor Lines Inc., 257 N.C. 782, 127 S.E.2d 578 (1962).

Character of Possession under Section.—Possession must be adverse; that is, title must be claimed against all the world. United States v. Chatham, 208 F. Supp. 220 (W.D.N.C. 1962).

Possession Must Be Such as to Make Adverse Claimant Liable to Action of Ejectment. In order to ripen a colorable title into a good title there must be such possession and acts of dominion by the colorable claimant as will make him liable to an action of ejectment. Justice v. Mitchell, 238 N.C. 364, 78 S.E.2d 122 (1953).

And So Notorious as to Put True Owner on Notice of Adverse Claim. The rule requiring physical possession so notorious as to put the true owner on notice of the adverse claim in order to mature claimant's title is as well settled as the rule requiring plaintiff to establish his title. Cothran v. Akers Motor Lines, Inc., 257 N.C. 782, 127 S.E.2d 578 (1962).

Possession by the grantee of a life tenant is not adverse to the rights of the remaindermen during the life of the life tenant. The seven-year statute of limitation prescribed by this section does not begin to run against the remaindermen until the life tenant dies. Sprinkle v. City of Reidsville, 235 N.C. 140, 69 S.E.2d 179 (1952).

The grantee in a deed conveying only the life estate of the grantor cannot hold adversely to the remaindermen until the death of the grantor, and where one of the remaindermen is then under the disability of infancy the grantee cannot acquire title by adverse possession against him under color of the deed until after the lapse of seven years from the removal of the disability. Lovett v. Stone, 239 N.C. 206, 79 S.E.2d 479 (1954).

Evidence of adverse possession held sufficent to be submitted to the jury under claim of title by seven years adverse possession under color. Newkirk v. Porter, 240 N.C. 296, 82 S.E.2d 74 (1954).

Cited in United States v. Burnette, 103 F. Supp. 645 (W.D.N.C. 1952); Wilson v. Chandler, 235 N.C. 373, 70 S.E.2d 179 (1952); Chambers v. Chambers, 235 N.C. 749, 71 S.E.2d 57 (1952); Waddell v. Carson, 245 N.C. 669, 97 S.E.2d 222 (1957); Morehead v. Harris, 255 N.C. 130, 120 S.E.2d 425 (1961); Lane v. Lane, 255 N.C. 444, 121 S.E.2d 893 (1961); Mallet v. Huske, 262 N.C. 177, 136 S.E.2d 553 (1964); Patterson v. Buchanan, 265 N.C. 214, 143 S.E.2d 76 (1965); Scott Poultry Co. v. Graves, 272 N.C. 22, 157 S.E.2d 608 (1967).

§ 1-39. Seizin within twenty years necessary.

This section and § 1-42 are construed together. Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953); Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959).

This section and § 1-42 are to be construed together. When so construed, the rule is as follows: It is not necessary that a plaintiff in an action to recover land should allege in his complaint that he had possession within twenty years before action brought; for, if he establishes on the trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966), commented on in 45 N.C.L. Rev. 964 (1967).

Failure to Allege Seizin Not Ground for Demurrer.—In an action for possession of land failure to affirmatively allege that plaintiff had been seized or possessed of the premises within twenty years prior to the institution of the action is not ground for demurrer. Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959).

Applied in Tripp v. Keais, 255 N.C. 404, 121 S.E.2d 596 (1961).

Cited in Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952); Washington v. McLawhorn, 237 N.C. 449, 75 S.E.2d 402 (1953).

§ 1-40. Twenty years adverse possession.

Section Applies to State and Its Agencies.—The General Assembly intended that this section and § 1-38 should apply to any legal entity, including the State of North Carolina and its agencies, capable of adversely possessing land and of acquiring title thereto. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966), commented on in 45 N.C.L. Rev. 964 (1967).

The plaintiffs' unregistered deed does not prevent their setting up adverse possession for twenty years. Sessoms v. McDonald, 237 N.C. 720, 75 S.E.2d 904 (1953).

Tenants in Common—Possession of One, etc.—

See Battle v. Battle, 235 N.C. 499, 70 S.E.2d 492 (1952).

In accord with 1st paragraph in original. See Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952).

Adverse possession, even under color of title, will not ripen title as against a tenant in common short of twenty years Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952).

The possession of one tenant in common is in law the possession of all his cotenants, unless and until there has been an actual ouster or a sole adverse possession of twenty years, receiving the rents and claiming the land as his own, from which actual ouster would be presumed. Morehead v. Harris, 262 N.C. 330. 137 S.E.2d 174 (1964).

In the absence of an actual ouster, the ouster of one tenant in common by a cotenant will not be presumed from an exclusive use of the common property and the appropriation of its profits to his own use for a less period than twenty years, and the result is not changed when one enters to whom a tenant in common has by deed attempted to convey the entire tract. Morehead v. Harris, 262 N.C. 330, 137 S.E.2d 174 (1964).

One may assert title to land embraced within the bounds of another's deed, etc.—

In accord with original. See Scott v Lewis, 246 N.C. 298, 98 S.E.2d 294 (1957).

There can be no constructive possession by one holding land adversely unless he holds under color of title Carswell v Town of Morganton, 236 N.C. 375, 72 S.E.2d 748 (1952).

Adverse Possessor Cannot Enlarge Rights beyond Limits of Actual Possession.—An adverse possessor of land without color of title cannot acquire title to any greater amount of land than that which he has actually occupied for the statutory period He cannot enlarge his rights beyond the limits of his actual possession by a claim of title to other land abutting that which he actually occupies, even though such other land may be defined by marked boundaries Carswell v Town of Morganton, 236 N.C. 375, 72 S.E.2d 748 (1952).

Where the plaintiffs rely upon adverse possession alone without color of title, title acquired under such circumstances is confined to the lands actually occupied An adverse possessor of land without color of title cannot acquire title to any greater amount of land than that which he has actually occupied for the statutory period Sessoms v. McDonald, 237 N.C. 720, 75 S.E.2d 904 (1953).

Several successive possessions may be tacked for the purpose of showing a continuous adverse possession where there is privity of estate or connection of title between several occupants Williams v Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952).

The adverse possession of an ancestor may be cast by descent upon his heirs and tacked to their possession for the purpose of showing title by adverse possession International Paper Co. v. Jacobs, 258 N.C. 439, 128 S.E.2d 818 (1963).

Where There Was No Hiatus or Interruption in Possession.—To establish possession for the requisite twenty years, it is permissible to tie the possession of an ancestor to that of the heir when there was no hiatus or interruption in the possession International Paper Co. v. Jacobs. 258 N.C. 439, 128 S.E.2d 818 (1963).

Deed Held Inoperative to Fix "Known and Visible Lines and Boundaries".—The deed relied on by plaintiffs being inoperative as color of title. the description therein was equally inoperative to fix "known and visible lines and boundaries" as the basis for a claim of adverse possession for twenty years. Powell v. Mills, 237 N.C. 582, 75 S.E.2d 759 (1953).

Effect of Appointment of Receiver. — When a statute of limitations has begun to run. no subsequent disability will stop it. and ordinarily the mere appointment of a receiver will not toll the statute unless the circumstances are such that such appointment precludes the institution of suit Thus, when a receiver has full authority to institute suit, as in the instant case, his appointment will not suspend the running of limitations under this section Nicholas v Salisbury Hardware & Furniture Co., 248 N.C. 462, 103 S.E.2d 837 (1958).

Evidence Sufficient to Take Question of Adverse Possession to Jury. See Chambers v. Chambers, 235 N.C. 749, 71 S.E.2d 57 (1952), reh. denied 236 N.C. appx.

Evidence held sufficient to overrule nonsuit in plaintiffs' action to establish title to land by adverse possession Everett v Sanderson, 238 N.C. 564, 78 S.E.2d 408 (1953).

Evidence Held Insufficient. — Plaintiff claimed that his predecessor in title went into possession of two tracts of land through a tenant who possessed both tracts of land for at least twenty years without color of title Plaintiff's evidence tended to show that the tenant actually occupied only a few acres of one of the tracts, without evidence tending to describe, identify, or locate the particular land actually occupied It was held that nonsuit was properly entered Carswell v Town of Morganton, 236 N.C. 375, 72 S.E.2d 748 (1952).

Evidence offered was insufficient to identify the lines and boundaries of any particular portion in actual possession Scott v. Lewis, 246 N.C. 298, 98 S.E.2d 294 (1957).

Applied in Newkirk v. Porter, 237 N.C 115, 74 S.E.2d 235 (1953); Chisholm v. Hall, 255 N.C. 374, 121 S.E.2d 726 (1961).

Stated in Jenkins v. Trantham, 244 N.C. 422, 94 S.E.2d 311 (1956).

Cited in Wilson v. Chandler, 235 N.C. 373, 70 S.E.2d 179 (1952); Washington v. McLawhorn, 237 N.C. 449, 75 S.E.2d 402 (1953); Justice v. Mitchell, 238 N.C. 364, 78 S.E.2d 122 (1953); Newkirk v. Porter, 240 N.C. 296, 82 S.E.2d 74 (1954); Morehead v. Harris, 255 N.C. 130, 120 S.E.2d 425 (1961); Lane v. Lane, 255 N.C. 444, 121 S.E.2d 893 (1961); Patterson v. Buchanan, 26[illegible] N.C. [illegible], [illegible] S.E.2d [illegible] (1965); Scott Poultry Co. v. Bryan Oil Co., 272 N.C. 16, 157 S.E.2d 693 (1967).

§ 1-42. Possession follows legal title; severance of surface and subsurface rights. In every action for the recovery or possession of real property, or damages for a trespass on such possession, the person establishing a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person is deemed to have been under, and in subordination to, the legal title, unless it appears that the premises have been held and possessed adversely to the legal title for the time prescribed by law before the commencement of the action. Provided that a record chain of title to the premises for a period of thirty years next preceding the commencement of the action, together with the identification of the lands described therein, shall be prima facie evidence of possession thereof within the time required by law.

In all controversies and litigation wherein it shall be made to appear from the public records that there has been at some previous time a separation or severance between the surface and the subsurface rights, title or properties of an area, no holder or claimant of the subsurface title or rights therein shall be entitled to evidence or prove any use of the surface, by himself or by his predecessors in title or of lessees or agents, as adverse possession against the holder of said surface rights or title; and likewise no holder or claimant of the surface rights shall be entitled to evidence or prove any use of the subsurface rights, by himself, or by his predecessors in title or of lessees or agents, as adverse possession against the holder of said subsurface rights, unless, in either case, at the time of beginning such allegedly adverse use and in each year of the same, said party or his predecessor in title so using shall have placed or caused to be placed upon the records of the register of deeds of the county wherein such property lies and in a book therein kept or provided for such purposes, a brief notice of intended use giving (i) the date of beginning or recommencing of the operation or use, (ii) a brief description of the property involved but sufficiently adequate to make said property readily locatable therefrom, (iii) the name and, if known, the address of the claimant of the right under which the operation or use is to be carried on or made and (iv) the deed or other instrument, if any, under which the right to conduct such operation or to make such use is claimed or to which it is to be attached. (C. C. P., s. 25; Code, s. 146; Rev., s. 386; C. S., s. 432; 1945, c. 869; 1959, c. 469; 1965, c. 1094.)

Editor's Note.—

The 1959 amendment added the proviso to the first paragraph.

The 1965 amendment inserted "together with the identification of the lands described therein" in the last sentence of the first paragraph

For note on the relationship of this section to the acquisition of easements by prescription, see 32 N.C.L. Rev. 483 (1954).

For article concerning the quest for clear land titles in North Carolina, see 44 N.C.L. Rev. 89 (1965).

Construed with § 1-39.—

This section and § 1-39 are construed together. Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953); Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959).

Section 1-39 and this section are to be construed together. When so construed, the rule is as follows: It is not necessary that a plaintiff in an action to recover land should allege in his complaint that he had possession within twenty years before action brought; for, if he establishes on the trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966), commented on in 45 N.C.L. Rev. 964 (1967).

Claim of Title under Paper Writing More Than Thirty Years Old.—This section does not declare that one who claims title relying merely on a paper writing more than thirty years old, thereby acquires title to the land described in the instrument nor does it establish title prima facie. Bowers v. Mitchell, 258 N.C. 80, 128 S.E.2d 6 (1962).

Quoted in DeBruhl v. L. Harvey & Son Co., 250 N.C. 161, 108 S.E.2d 469 (1959).

Cited in Walker v. Story, 253 N.C. 59, 116 S.E.2d 147 (1960).

§ 1-42.1. Certain ancient mineral claims extinguished.—(a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interests in an area of land has been severed or separated from the surface fee simple ownership of such land and such interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, or that the record title holder of any such oil, gas or mineral interests has not listed the same for ad valorem tax purposes in the county in which the same is located for a period of ten (10) years prior to January 1, 1965, any person, having the legal capacity to own land in this State, who has on September 1, 1965 an unbroken chain of title of record to such surface estate of such area of land for fifty (50) years or more, and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interests in such area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was executed or recorded fifty (50) years or more prior to September 1, 1965, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, that any such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two (2) years after September 1, 1965, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of such oil, gas or mineral interest and gives the book and page where recorded. Such notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein such area of land, or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner and also contain either such a description of the area of land involved as to make said property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. Such notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is either under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral releases.

(d) All oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interest must be filed in writing in the manner provided by G.S. 1-42.1 (b) and recorded in the local registry in the book provided by G.S. 1-42 within two years from September 1, 1967, to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interests shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by chapter 105 of the General Statutes of North Carolina. The board of county commissioners shall publish a notice of this subsection in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to September 1, 1967.

The provisions of this subsection shall apply to the following counties: Anson, Buncombe, Durham, Franklin, Guilford, Hoke, Jackson, Montgomery, Person, Richmond, Swain, Transylvania, Union, Wake and Warren. (1965, c. 1072, s. 1; 1967, c. 905.)

Editor's Note.—Section 3 of the act inserting this section makes it effective Sept. 1, 1965.

The 1967 amendment added subsection (d).

§ 1-43. Tenant's possession is landlord's.

Quoted in Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952).

§ 1-44. No title by possession of right-of-way.

Effect of Section.—

When a railroad has acquired and entered upon the enjoyment of its easement, the further appropriation and use by it of the right-of-way for necessary railroad business may not be destroyed or impaired by reason of the occupation of it by the owner or any other person. Keziah v. Seaboard Air Line R.R., 272 N.C. 299, 158 S.E.2d 539 (1968).

Railroad Right-of-Way Acquired by Statutory Presumption. — See Keziah v. Seaboard Air Line R.R., 272 N.C. 299, 158 S.E.2d 539 (1968).

The fact that others own the fee in the right-of-way and such ownership is indicated by deed or map appearing in the public registry presents no evidence of probative force that the right-of-way does not belong to the railroad, since it only has an easement which it may exercise to the full extent when in its judgment the necessities of its business so require. Keziah v. Seaboard Air Line R.R., 272 N.C. 299, 158 S.E.2d 539 (1968).

Applied in Withers v. Long Mfg. Co., 259 N.C. 139, 129 S.E.2d 886 (1963).

§ 1-44.1. Presumption of abandonment of railroad right of way.—Any railroad which has removed its tracks from a right of way and has not replaced them in whole or in part within a period of seven (7) years after such removal and which has not made any railroad use of any part of such right of way after such removal of tracks for a period of seven (7) years after such removal, shall be presumed to have abandoned the railroad right of way. (1955, c. 657.)

§ 1-45. No title by possession of public ways.

Adverse use of a part of a street dedicated to and accepted by the public cannot ripen title in the user when there has been an acceptance of the dedication of the street and no abandonment thereof on the part of the public. Salisbury v. Barnhardt, 249 N.C. 549, 107 S.E.2d 297 (1959).

Application of Section.—

Where there is a dedication and acceptance by the municipality or other governing body of public ways or squares and commons in this jurisdiction the statute of limitations does not now run against the municipality or governing body. Steadman v. Pinetops, 251 N.C. 509, 112 S.E.2d 102 (1960).

This section does not apply to streets, alleys and parks that have been offered for dedication if the offer has not been accepted, or if the offer has been accepted but the streets, alleys or parks have been abandoned. Lee v. Walker, 234 N.C. 687, 68 S.E.2d 664 (1952); Salisbury v. Barnhardt, 249 N.C. 549, 107 S.E.2d 297 (1959).

The rule that individuals may not acquire title to any part of a municipal street by encroaching upon or obstructing the same in any way does not apply when the evidence fails to show that the municipality had any title or rights therein. Hall v. City of Fayetteville, 248 N.C. 474, 103 S.E.2d 815 (1958).

ARTICLE 5

Limitations, Other than Real Property

§ 1-46. Periods prescribed.

Cited in Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957); Thurston Motor Lines, Inc. v. General Motors Corp., 258 N.C. 323, 128 S.E.2d 413 (1962); Clardy v. Duke University, 299 F.2d 368 (4th Cir. 1962).

§ 1-47. Ten years.—Within ten years an action—

(1) Upon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its rendition. No such action may be brought more than once, or have the effect to continue the lien of the original judgment.

(1.1) Upon a judgment rendered by a justice of the peace, from its date.

(2) Upon a sealed instrument against the principal thereto. Provided, however, that if action on a sealed instrument is filed, the defendant or defendants in such action may file a counterclaim arising out of the same transaction or transactions as are the subject of plaintiff's claim, although a shorter statute of limitations would otherwise apply to defendant's counterclaim. Such counterclaim may be filed against such parties as provided in G.S. 1A-1, Rules of Civil Procedure.

(3) For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.

(4) For the redemption of a mortgage, where the mortgagee has been in possession, or for a residuary interest under a deed in trust for creditors, where the trustee or those holding under him has been in possession, within ten years after the right of action accrued.

(5): Repealed by Session Laws 1959, c. 879, s. 2.

(C. C. P., ss. 14, 31; Code, s. 152; Rev., s. 391; C. S., s. 437; 1937, c. 368; 1959, c. 879, s. 2; 1961, c. 115, s. 2; 1969, c. 810, s. 1.)

II-A. Subs. (1.1). Judgments Rendered by Justices.

I. IN GENERAL.

Editor's Note.—

The 1959 amendment repealed subdivision (5). Section 15 of the act provides that it "shall become effective July 1, 1960, and shall be applicable only to estates of persons dying on or after July 1, 1960."

The 1961 amendment, effective Oct. 1, 1961, inserted subdivision (1.1).

The 1969 amendment, effective Jan. 1, 1970, added the last two sentences of subdivision (2).

Session Laws 1969, c. 810, s. 3, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on or after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act no significance shall be attached to the fact that this act was enacted at a later date."

For comment on application of statute

of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965).

Plea of Statute Places Burden on Plaintiff to Show Action Not Barred. — Upon defendant's plea of the statute of limitations the burden devolved upon plaintiffs to show that their action was not barred but was instituted within the time permitted by statute. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Cited in First-Citizens Bank & Trust Co. v. Parker, 235 N.C. 326, 69 S.E.2d 841 (1952); State v. Bryant, 251 N.C. 423, 111 S.E.2d 591 (1959); Scott Poultry Co. v. Graves, 272 N.C. 22, 157 S.E.2d 608 (1967).

II. SUBS (1) JUDGMENTS AND DECREES.

Section Does Not Apply to Award by Industrial Commission. - Conceding an award of compensation by the Industrial Commission has certain characteristics of a judgment, such award is not a judgment of a court within the meaning of subsection (1). Bryant v. Poole, 261 N.C 553, 135 S.E.2d 629 (1964).

When Statute Begins to Run—Judgment in Favor of Infant.—The statute limiting the time to bring an action on a judgment to ten years from the date of its rendition does not begin to run as against an infant where the judgment was procured on his behalf by a next friend appointed for that purpose. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Section 1-17 permits the plaintiff to bring an action on a judgment secured by a next friend for an infant when the infant was nine years old within the time limited by subsection (1) of this section, i.e.. ten years, after he became twenty-one years old. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Applied in Hanson v. Yandle, 253 N.C. 532, 70 S.E.2d 565 (1952).

Cited in Reid v. Bristol, 241 N.C. 699, 86 S.E.2d 417 (1955).

II-A. SUBS. (1.1). JUDGMENTS RENDERED BY JUSTICES.

Limitation Is Now Ten Years. — The period now prescribed for the commencement of an action on judgment rendered in a justice's court is ten years from its date. Bryant v Poole, 261 N.C. 553, 135 S.E.2d 629 (1964).

III SUBS. (2) SEALED INSTRUMENTS.

Section Applicable Only to Principals.—By its express terms, subsection (2) of this section is applicable only to principals. Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

Notwithstanding Seal.—Affixing a seal to an instrument does not make this section applicable. Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

The statute of limitations barring actions against defendants as sureties is § 1-52, notwithstanding the seal appearing after their names Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

Original Agreement Executed on Independent Consideration.—Where the contract sued upon is an original agreement executed on an independent consideration and the defendant promisor is a principal, the ten year statute of limitations is controlling New Amsterdam Cas Co v Waller, 233 N.C. 536, 64 S.E.2d 826 (1951).

What Plaintiff Must Show.—The burden is upon plaintiffs to prove that the action accrued within the time limited by this section, by showing that the corporate defendant adopted the seal appearing on the contract for the special occasion or for all similar occasions, or that such seal became the seal of the corporation by reason of some other rule of law, or that the regular corporate seal was impressed or attached to the original of the contract, or that there are facts and circumstances which exclude the operation of the three-year statute, § 1-52, other than the matter of a seal. Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965)

V. SUBS (4). REDEMPTION OF MORTGAGE.

Mortgagor's Widow's Right to Dower Not Affected.—The mortgagor loses his right to redeem the premises in question prior to his death by permitting the mortgagee to remain in possession for more than ten years after his right to redeem has accrued provided the provisions of this section are pleaded in bar thereof, but the loss of the mortgagor's right to redeem does not affect his widow's right to dower in the equity of redemption Gay v. J. Exum & Co., 234 N.C. 378, 67 S.E.2d 290 (1951), commented on in 30 N.C.L. Rev. 310 (1952).

Applied in Barbee v. Edwards, 238 N.C. 215, 77 S.E. 646 (1953); Jordan v. Chappel, 246 N.C. 620, 99 S.E.2d 778 (1957).

§ 1-49. Seven years

1: Repealed by Session Laws 1961, c. 115, s. 1.

Cross References.

As to present limitations of an action on a judgment by a justice of the peace see § 1-47.

Editor's Note. – The 1961 amendment, effective Oct 1, 1961, repealed subsection 1.

Cited in Reid v. Bristol, 241 N.C. 699, 86 S.E.2d 417 (1955).

§ 1-50. Six years.—Within six years an action—

(1) Upon the official bond of a public officer.

(2) Against an executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final account by the proper officer, and the filing of the audited account as required by law.

(3) For injury to any incorporeal hereditament.

(4) Against a corporation, or the holder of a certificate or duplicate certificate of stock in the corporation, on account of any dividend, either a cash or stock dividend, paid or allotted by the corporation to the holder of the certificate or duplicate certificate of stock in the corporation.

(5) No action to recover damages for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, more than six (6) years after the performance or furnishing of such services and construction. This limitation shall not apply to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action. (C. C. P., s 33; Code, s. 154; Rev., s. 393; C. S., s. 439; 1931, c. 169; 1963, c. 1030.)

I. IN GENERAL.

Editor's Note.—

The 1963 amendment added subdivision (5).

Plea of Statute Places Burden on Plaintiff to Show Action Not Barred. — Upon defendant's plea of the statute of limitations the burden devolved upon plaintiffs to show that their action was not barred but was instituted within the time permitted by statute. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Cited in J.G. Dudley Co. v. Commissioner, 298 F.2d 750 (4th Cir. 1962); Jewell v. Price, 264 N.C. 459, 142 S.E.2d 1 (1965).

§ 1-52. Three years

XI. Subsection Eleven—Fair Labor Standards Act.

I. IN GENERAL.

Editor's Note.—

For comment on limitations as to claims between spouses, see 44 N.C.L. Rev. 197 (1965).

Opinions of Attorney General. — Mr. John R. Parker, Sampson County Attorney, 9/17/69.

Burden of Proving Section.—

In accord with original. See Swartzberg v. Reserve Life Ins. Co., 252 N.C. 150, 113 S.E.2d 270 (1960).

While the plea of the statute of limitations is a positive defense and must be pleaded, even so, when it has been properly pleaded, the burden of proof is then upon the party against whom the statute is pleaded to show that his claim is not barred, and is not upon the party pleading the statute to show that it is barred Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

Upon defendant's plea of the statute of

limitations the burden devolved upon plaintiffs to show that their action was not barred but was instituted within the time permitted by statute. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Upon the plea of this section the burden is on plaintiffs to show that they instituted their action within the prescribed period. Lewis v. Godwin Oil Co., 1 N.C. App. 570, 162 S.E.2d 135 (1968).

Failure to Sustain Burden. — Where a party against whom the statute has been pleaded fails to sustain the burden on him to show that limitations had not run against his cause of action, it is proper for the court to grant a motion for nonsuit. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

When Cause of Action Accrues. — A cause of action accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. This rule is subject to certain exceptions, such as torts grounded on fraud or mistake. Lewis v. Godwin Oil Co., 1 N.C. App. 570, 162 S.E.2d 135 (1968).

Where there is a breach of an agreement or the invasion of an agreement or the invasion of a right, the law infers some damage. The losses thereafter resulting from the injury, at least where they flow from it proximately and in continuous sequence, are considered in aggravation of damages. The accrual of the cause of action must therefore be reckoned from the time when the first injury was sustained. When the right of the party is once violated, even in ever so small a degree, the injury, in the technical acceptation of that term, at once springs into existence and the cause of action is complete. Lewis v. Godwin Oil Co., 1 N.C. App. 570, 162 S.E.2d 135 (1968).

Classification Is Based upon Nature of Right. Rather than Remedy.—There is no suggestion of classification in the limitations statutes on the basis of remedies which might be available for enforcement of the substantive right. The right asserted is determinative, not the relief sought. New Amsterdam Cas Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

The classification in the limitations statutes is based upon the substantive nature of the cause of action. New Amsterdam Cas. Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

For purposes of limitations the North Carolina court has looked to the nature of the right of the litigant which calls for judicial aid, not to the nature of the remedy to rectify the wrong. New Amsterdam Cas. Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

The period prescribed for the commencement of an action whether considered an action for breach of warranty or an action for negligence, is three years from the time the cause of action accrued. Thurston Motor Lines, Inc. v. General Motors Corp., 258 N.C. 323, 128 S.E.2d 413 (1962).

When the statute begins to run, it continues until stopped by appropriate judicial process. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

Section Applies Though Enforcing Remedy Is Equitable Lien.—The ten-year statute applies when the title to property is at issue, not where the action is merely for breach of contract, though the enforcing remedy, the equitable lien, is analogous to remedies for resort to which the statute of limitations is ten years. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Effect of Equity upon Claim.—

The lapse of time, when properly pleaded, is a technical legal defense. Nevertheless, equity will deny the right to assert that defense when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith. Nowell v. Great Atl. & Pac. Tea Co., 250 N.C. 575, 108 S.E.2d 889 (1959).

The defense of the statute is not barred by the existence of a fiduciary relation between the parties. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965)

Statute Runs between Spouses.—Statutes of limitation run as well between spouses as between strangers. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Effect of Disability.—

A cause of action accrues to an injured party, so as to start the running of the statute of limitations, when he is at liberty to sue, being at the time under no disability. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

Disability of Infants.—The rule, except in suits for realty where the legal title is in the ward, is that the statute of limitations runs against an infant as to all rights of action which the guardian might bring and which it was incumbent on him to bring, in so far as may be consistent with the limitations of his office. Rowland v Beauchamp, 253 N.C. 231, 116 S.E.2d 720 (1960).

Part Payment by Joint Debtor.—

In accord with original. See Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323

(1960) But see Editor's Note under § 1-27.

Question of Law and Fact. — While, ordinarily, the bar of the statute of limitations is a mixed question of law and fact, nevertheless, where the party against whom the statute has been pleaded fails to sustain the burden on him to show that limitations had not run against his cause of action, it is proper for the court to grant a motion for nonsuit. Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

But where the facts are in doubt or in dispute and there is any evidence sufficient to justify the inference that the cause of action is not barred, the trial court may not withdraw the case from the jury. Solon Lodge v. Ionic Lodge. 247 N.C. 310, 101 S.E.2d 8 (1957).

Subsection Five—Injury to Person or Rights of Another.—

Subsection five applies to a cause of action to recover for personal injuries negligently inflicted. Stamey v. Rutherfordton Elec. Membership Corp., 249 N.C. 90, 105 S.E.2d 282 (1958).

An action for malicious prosecution or abuse of process was not barred by this section, where the action was begun two years, eleven months and twenty-one days after the plaintiff was discharged from the State hospital. Barnette v. Woody, 242 N.C. 424, 88 S.E.2d 223 (1955).

Action for Malpractice. — The period prescribed for the commencement of an action for malpractice based on negligence is three years from the time the cause of action accrues. Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957).

In actions involving the alleged tortious conduct of physicians and surgeons, the cause of action arises when the alleged wrongful act is committed. Clardy v. Duke Univ. 299 F.2d 368 (1962).

A resulting or constructive trust, as distinguished from an express trust, is governed by the ten-year statute of limitations (1-56) and not by the three-year statute of limitations (this section). Howell v. Alexander, 3 N.C. App. 371, 165 S.E.2d 256 (1969).

Laches.—Where the action is barred by the applicable statute of limitations, the question of laches does not arise; when an action is not barred by the statute of limitations, equity will not bar relief on the ground of laches except upon special facts demanding exceptional relief. Howell v. Alexander, 3 N.C. App. 371, 165 S.E.2d 256 (1969).

Applied in Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952); Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783 (1953); as to subsection 5, in Crowell v. Eastern Air Lines, 240 N.C. 20, 81 S.E.2d 178 (1954); Graham v. Taylor Biscuit Co., 161 F. Supp. 435 (M.D.N.C. 1957); Nowell v. Neal, 249 N.C. 516, 107 S.E.2d 107 (1959); Horne v. Cloninger, 256 N.C. 102, 123 S.E.2d 112 (1961); Snyder v. Wylie, 239 F. Supp. 999 (W.D.N.C. 1965); Sharpe v. Pugh, 270 N.C. 598, 155 S.E.2d 108 (1967); Cobb v. Clark, 4 N.C. App. 230, 166 S.E.2d 692 (1969).

Stated in Chas. R. Shepherd, Inc. v. Clement Bros. Co., 177 F. Supp. 288 (W.D.N.C. 1959).

Cited in United States v Lance, Inc., 95 F. Supp. 327 (W.D.N.C. 1951); Quevedo v. Deans, 234 N.C. 618, 68 S.E.2d 275 (1951); Wilson v. Chandler, 235 N.C. 373, 70 S.E.2d 179 (1952); Reid v. Holden, 242 N.C. 408, 88 S.E.2d 125 (1955); Reuning v. Henkel, 138 F. Supp. 492 (W.D.N.C. 1956); Piedmont Nat'l Gas Co. v. Day, 249 N.C. 482, 106 S.E.2d 678 (1959); Edwards v. Arnold, 250 N.C. 500, 109 S.E.2d 205 (1959); Styers v. Gastonia, 252 N.C. 572, 114 S.E.2d 348 (1960); J.G. Dudley Co. v. Commissioner, 298 F.2d 750 (4th Cir. 1962); Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965); Scott Poultry Co. v. Bryan Oil Co., 272 N.C. 16, 157 S.E.2d 693 (1967); Jones v. Warren, 274 N.C. 166, 161 S.E.2d 467 (1968); In re Estate of Nixon, 2 N.C. App. 422, 163 S.E.2d 274 (1968).

II. SUBSECTION ONE—CONTRACTS.

The statute begins to run on the date the promise is broken. Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

But a new promise to pay fixes a new date from which the statute runs. Such promise, to be binding, must be in writing as required by § 1-26. Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

Effect of Exercise of Acceleration Clause in Note.—Where the holder of a note exercises the acceleration clause therein contained by instituting an action against two of the comakers on the note for the entire indebtedness after default in the payment of an installment, the exercise of the acceleration clause is effective as to a third comaker even though he is not made a party to the action, and action on the note against the third comaker is barred after the elapse of more than three years from the exercise of the acceleration clause, the note not being under seal. Shoenterprise Corp. v. Willingham, 258 N.C. 36, 127 S.E.2d 767 (1962).

Indemnity Bond.—When the promisor in an indemnity bond has a personal, immediate, and pecuniary interest in the transaction in which the third party is the original obligor, the courts will always give effect to the promise as an original and direct promise to pay, and this section is not applicable. New Amsterdam Cas. Co. v. Waller, 233 N.C. 536, 64 S.E.2d 826 (1951).

Action Based on Implied Contract.—An action based on an implied contract is analogous to one based on the breach of an express trust, which is necessarily based on a breach of contract, and the limitation applicable to both such actions is three years. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Breach of Express Trust.—

Where a trust is based on an agreement or transaction operating as an express trust, the limitation applicable is the statute of three years set out in this section Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

Same—When Statute Begins to Run.—The general rule is that a trustee's repudiation of a trust and his assertion of an adverse claim of ownership is not sufficient to start the statute of limitations to running, unless and until such repudiation and claim are made known to the beneficiary of the trust so as to require him to assert his rights. Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

Where it appears that the relation of landlord and tenant has been established between trustee and cestui que trust, evidenced by voluntary payment of rent by the cestui que trust to the trustee, such relation ordinarily suffices to set the statute of limitations to running against the cestui que trust. But where, as in the instant case, the object of the trust is to hold and preserve title for the benefit of an unincorporated association, whose personnel is constantly in flux and subject to future change, the mere establishment of the relation of landlord and tenant and the collection of rent by the trustee, without more, is not enough to start the statute to running. To set the statute in motion it would be necessary to show that all the members of the unincorporated association had knowledge, or in law were charged with knowledge, that the trustee was exacting and the association officers were paying rent. Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

In the case of an express trust, the statute begins to run when the trustee disavows the trust with the knowledge of the cestui que trust. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Effect of Insurance Policy Provision That Action Be Commenced within Specified Time. — Where an agreement contained a contract insuring a carrier from loss by fire and theft, etc., and also a contract of suretyship in regard to claims of third persons under § 62-111, the court held that provisions of the insurance contract that action be commenced within a specified time are not applicable to claims under the surety contract, and the surety's right of action for reimbursement of claims of third persons paid by it does not arise until such payment, and action brought within three years of such payment is not barred either under the contract or by the three-year statute of limitations. American Nat'l Fire Ins. Co. v. Gibbs, 260 N.C. 681, 133 S.E.2d 669 (1963).

When compensation is to be provided in the will of the recipient, the cause of action accrues when he dies without having made the agreed testamentary provision. Johnson v. Sanders, 260 N.C. 291, 132 S.E.2d 582 (1963).

Claims for Services.—

When personal services are rendered with the understanding that compensation is to be made in the will of the recipient, payment therefor does not become due until death, and the statutes of limitations do not begin to run until that time. Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947); Speights v. Carraway, 247 N.C. 220, 100 S.E.2d 339 (1957).

A cause of action to recover for personal services rendered and funds advanced for the care of intestate in reliance upon intestate's promise to pay for same by willing property to plaintiff does not accrue until the death of intestate without having willed property to plaintiff, and this section can have no application when the action is commenced within three years of intestate's death. Speights v. Carraway, 247 N.C. 220, 100 S.E.2d 339 (1957).

This section bars a claim for personal services rendered a decedent only as to those services rendered more than three years prior to the date of decedent's death, and in view of § 1-22, the contention that this section bars the claim for all services rendered more than three years prior to the institution of the action is untenable. Hodge v. Perry, 255 N.C. 695, 122 S.E.2d 677 (1961).

Services rendered more than three years prior to the death of the recipient are barred by the statute of limitations in the absence of a contract to pay by testamentary provision. Johnson v. Sanders, 260 N.C. 291, 132 S.E.2d 582 (1963).

Daughter's failure to establish an express contract to pay by testamentary provision for her services to her father will not defeat her right to prosecute her claim for services rendered during the three years preceding her father's death. Johnson v. Sanders, 260 N.C. 291, 132 S.E.2d 582 (1963).

The right of action by one partner to compel an accounting by the other did not arise and the statute of limitations did not begin to run until the demanding partner had notice of the other partner's termination of the partnership and refusal to account. Prentzas v. Prentzas, 260 N.C. 101, 131 S.E.2d 678 (1963).

As between partners themselves the statute would not begin to run on the cause of action for an accounting until one partner had notice of the other's termination of the partnership and his refusal to account. This is but an application of the rule that the statute of limitations does not commence to run against a trustee until he repudiates his trust. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Sale of House with Defective Furnace.— Defendant's negligent breach of the legal duty arising out of his contractual relation with plaintiffs occurred when he delivered to them a house with a furnace lacking a draft regulator and, also, having been installed too close to combustible joists. Jewell v. Price, 264 N.C. 459, 142 S.E.2d 1 (1965).

In an action to recover payments made under a contract to sell realty, no question of the statute of limitations arises where the provisions of this section were not pleaded. Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967).

An action ex contractu brought by a municipal corporation to recover the cost of rebuilding a bridge, upon a breach by defendant of his contract with plaintiff to replace it, is an action to enforce private, corporate, or proprietary rights of the municipal corporation, and as such the three-year statute of limitations may be interposed as a defense by defendant. City of Reidsville v. Burton, 269 N.C. 206, 152 S.E.2d 147 (1967).

Accrual of Action Based Upon Breach of Warranty of Fitness and Safety of Tobacco Curer. — See Lewis v. Godwin Oil Co., 1 N.C. App. 570, 162 S.E.2d 135 (1968).

Applied in Nowell v. Neal, 249 N.C. 516, 107 S.E.2d 107 (1959); Nowell v. Great Atl. & Pac. Tea Co., 250 N.C. 575, 108 S.E.2d 889 (1959); Matthieu v. Piedmont Nat'l Gas Co., 269 N.C. 212, 152 S.E.2d 336 (1967).

III. SUBSECTION TWO—LIABILITY CREATED BY STATUTE.

Actions under Antitrust Laws. — It is not clear whether § 1-54(2) or § 1-52(2) governs actions under the antitrust laws It is clear, however, that in such cases, the sources of damage are separable for purposes of limitations Miller Motors Inc v Ford Motor Co., 149 F Supp 790 (M.D.N.C. 1957).

Section Applicable to Private Action for Treble Damages under Antitrust Laws.— A private action for treble damages under the antitrust laws is not an action to recover a penalty or forfeiture, but rather is an action upon a liability created by statute and is in the nature of an action of tort. It is remedial and compensatory Therefore this section is the applicable statute of limitations under which the plaintiff's cause of action lies. Thompson v North Carolina Theatres, Inc., 176 F Supp. 73 (W.D.N.C. 1959).

Stated in North Carolina Theatres, Inc. v. Thompson, 277 F.2d 673 (4th Cir. 1960).

Cited in Miller Motors, Inc. v Ford Motor Co., 252 F.2d 441 (4th Cir. 1958).

IV SUBSECTION THREE—TRESPASS UPON REALTY

Allegations Properly Stricken Where No Damages for Trespass Claimed. — In an action to remove cloud on title in which defendants claim title by adverse possession, allegations in the answer pleading that plaintiffs' cause of action for trespass accrued more than three years prior to the commencement of the action are properly stricken as irrelevant, there being no claim of damages for trespass. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966).

Action for Recurrent Trespass Not Barred by Statute of Limitations. - Plaintiff instituted this action to recover damages to his land caused by the seeping of gasoline from defendant's underground storage tank Defendant pleaded the statute of limitations because the action was not instituted within three years from the first injury alleged By reply plaintiff alleged that on three separate occasions defendant dug up and reinstalled the tank to stop the leakage, the last of which was within three years of the institution of the action It was held that, construing the reply liberally it was sufficient to allege recurring acts of negligence or wrongful conduct, each causing a renewed injury to plaintiff's property, and therefore demurrer to the reply should have been overruled. Oakley v. Texas Co., 236 N.C. 751, 73 S.E.2d 898 (1953).

Cited in Lyda v. Marion, 239 N.C. 265, 79 S.E.2d 726 (1954).

VI. SUBSECTION SIX—SURETIES OF EXECUTORS, ETC.

Effect of Seal.—This section creates the statute of limitations for sureties, notwithstanding the fact that a seal may appear after their names. Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

IX. SUBSECTION NINE—FRAUD OR MISTAKE.

Editor's Note.—For comment on running of limitations against equitable claims, see 44 N.C.L. Rev. 202 (1965).

Scope of Words "Relief on the Ground of Fraud". — In the construction of this section, the words "relief on the ground of fraud" are used in the broad sense to apply to all actions, both legal and equitable, where fraud is an element, and to all forms of fraud, including deception, imposition, duress, and undue influence. Swartzberg v. Reserve Life Ins. Co., 252 N.C. 150, 113 S.E.2d 270 (1960).

Declaration of Constructive Trust.—The period of limitations for actions in which the relief asked is the declaration of a constructive trust is determined by reference to the nature of the substantive right asserted. New Amsterdam Cas. Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

A declaration that one is a constructive trustee is an appropriate remedial step but it is not descriptive of the substantive right, and the fact that the plaintiff seeks it is irrelevant to the question of limitations. New Amsterdam Cas. Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

When Statute Begins to Run.—

In accord with 2nd paragraph in original. See Brooks v. Ervin Constr. Co., 253 N.C. 214, 116 S.E.2d 454 (1960); B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

The action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

In order to exercise their right to an accounting twenty-six years after it accrued, plaintiffs must establish that they exercised it within three years of the time they discovered or ought by reasonable diligence under the circumstances to have discovered the fraud. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

It is generally held that where there is concealment of fraud or continuing fraud, the statute of limitations does not bar a suit for relief on account of it, and thereby permit the statute which was designed to prevent fraud to become an instrument to perpetrate and perpetuate it. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

A failure to use such diligence as is ordinarily required of two persons transacting business with each other may be excused when there exists such a relation of trust and confidence between the parties that it is the duty, on the part of the one who committed the fraud and thereby induced the other to refrain from inquiry, to disclose to the other the truth. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Bar of Statute May Be Raised Only by Answer. — Subsection (9) of this section is not annexed to the cause of action in a case of fraudulent substitution of names in a deed which is then registered. The bar thereof may only be raised by answer. Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959).

Same—Record as Notice of Fraud.—

A cause of action for fraud does not accrue and the statute of limitations, subsection (9) of this section, does not begin to run until the facts constituting the fraud are known or should have been discovered in the exercise of due diligence and the mere registration of a deed, standing alone, will not be imputed for constructive notice. Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959).

Cause of Action to Set Aside Deed for Fraud and Undue Influence.— Where it is established that the person under whom plaintiffs claim was mentally competent and had knowledge for more than three years prior to her death of the facts constituting the basis of the cause of action to set aside a deed to property for fraud and undue influence, plaintiffs' claim is barred. Muse v. Muse, 236 N.C. 182, 72 S.E.2d 431 (1952).

A resulting or constructive trust, as distinguished from an express trust, is governed by the ten-year and not the three-year statute of limitations. Bowen v. Darden, 241 N.C. 11, 84 S.E.2d 289 (1954).

Rescission of Insurance Policy. — Whether considered fraud "in the broad sense," or "mistake," subsection (9) of this section is applicable to an action to rescind an insurance policy on the ground of false material statements in the application therefor. Swartzberg v. Reserve

Life Ins. Co., 252 N.C. 150, 113 S.E.2d 270 (1960).

Amendment of Complaint. — Where it appeared from plaintiff's own pleadings and admissions that plaintiff discovered and had knowledge of the alleged fraud more than three years prior to the filing of an amendment to her complaint, which for the first time alleged the cause of action for fraud, the action was barred by subsection (9) of this section. Nowell v. Hamilton, 249 N.C. 523, 107 S.E.2d 112 (1959).

Burden of Proof.—

In accord with 1st paragraph in original. See Willetts v. Willetts, 254 N.C. 136, 118 S.E.2d 548 (1961).

Evidence Sufficient to Show Action Commenced within Statutory Time.—In an action to recover damages for fraudulent representations as to the amount of land included in a lot purchased by plaintiffs, plaintiffs' testimony was sufficient to show that the action was begun within three years from the time the facts constituting the alleged fraud were discovered, or should have been discovered by them in the exercise of reasonable diligence Swinton v. Savoy Realty Co., 236 N.C. 723, 73 S.E.2d 785 (1953).

Cross Action Filed More than Three Years from Discovery of Fraud Properly Dismissed. — Where defendant in his answer alleges that he refused to comply with his contract on the contractual date because of his discovery of fraudulent misrepresentations inducing his execution of the contract, and files a cross action against plaintiff and his codefendants for such fraud more than three years after the contractual date, judgment dismissing the cross action on motion upon the plea of the three year statute of limitations is without error. Speas v. Ford, 253 N.C. 770, 117 S.E.2d 784 (1961).

Applied in Sandlin v. Weaver, 240 N.C. 703, 83 S.E.2d 806 (1954).

XI. SUBSECTION ELEVEN—FAIR LABOR STANDARDS ACT.

Purpose.—Subsection (11) of this section was passed in order to enlarge the period of limitations for the recovery of penalties under the Fair Labor Standards Act, which would otherwise have been limited to the period of one year under subdivision (2) of § 1-54. North Carolina Theatres, Inc. v. Thompson, 277 F.2d 673 (4th Cir. 1960).

§ 1-53. Two years.

Cross References.

See note to § 28-173.

I. SUBSECTION ONE—POLITICAL SUBDIVISIONS OF STATE.

Actions for Damages Based on Torts.—The words "claims," "maturity" and "holders," appearing in the first clause of subsection (1), as well as the further provisions thereof, and the history of the statute, impel the conclusion that this subsection does not apply to actions for damages based on torts. Dennis v. Albemarle, 242 N.C. 263, 87 S.E.2d 561 (1955).

This section and § 153-64 do not require the filing of a claim with a city before suit may be brought for damages for a tort committed by the city in a proprietary activity. Bowling v. City of Oxford, 267 N.C. 552, 148 S.E.2d 624 (1966).

Applied in Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

Cited in Styers v. Gastonia, 252 N.C. 572, 114 S.E.2d 348 (1960); Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966).

II. SUBSECTION TWO—PENALTY FOR USURY.

When Statute Begins to Run.—

The right of action to recover the penalty for usury paid accrues upon each payment of usurious interest when that payment is made, each payment of usurious interest giving rise to a separate cause of action to recover the penalty therefor, which action is barred by the statute of limitations at the expiration of two years from such payment. Henderson v. Security Mtg. & Fin. Co., 273 N.C. 253, 160 S.E.2d 39 (1968).

Applied in Preyer v. Parker, 257 N.C. 440, 125 S.E.2d 916 (1962).

IV. SUBSECTION FOUR — DEATH BY WRONGFUL ACT.

Editor's Note.—

This section and § 28-173 were amended in 1951 so as to remove from the latter section the provision previously contained therein fixing the period of time in which an action for damages for wrongful death must be instituted and so as to make such action subject to the two-year statute of limitations set forth in this section. The effect of the amendment was to make the time limitation a statute of limitations and no longer a condition precedent to the right to bring and maintain the action. Kinlaw v. Norfolk So. Ry., 269 N.C. 110, 152 S.E.2d 329 (1967).

Effect of 1951 Amendments to This Section and § 28-173.—Up to the time of the amendments of 1951 to § 28-173 and this section it had consistently been held that the time limitation in § 28-173 was not a statute of limitations, but rather a condition precedent to maintenance of an action. The effect of the amendments was to remove the time limitation from the Wrongful Death Act and make the act subject to the statute of limitations of two years. McCrater v. Stone & Webster Eng'r Corp., 248 N.C. 707, 104 S.E.2d 858 (1958).

Prior to the enactment of subsection (4) of this section, which amended § 28-173, the institution of an action for wrongful death within one year after such death was a condition precedent to maintaining the action. All other requirements of the section were also strictly construed. The amendment removed the time limitation as a condition annexed to the cause of action and made it a two-year statute of limitation. Graves v. Welborn, 260 N.C. 688, 133 S.E.2d 761 (1963).

Amendment of Complaint. — In an action for wrongful death, where the original complaint fails to state facts sufficient to constitute a cause of action, an amendment supplying the deficiency does not relate back to the commencement of the action but constitutes a new cause of action for the purpose of computing the bar of the statute of limitations. In each such instance the ultimate determinative question is whether the amendment states a new cause of action. Stamey v. Rutherfordton Elec. Membership Corp., 249 N.C. 90, 105 S.E.2d 282 (1958).

Applied in Hall v. Carroll, 253 N.C. 220, 116 S.E.2d 459 (1960); Hardbarger v. Deal, 258 N.C. 31, 127 S.E.2d 771 (1962); High v. Broadnax, 271 N.C. 313, 156 S.E.2d 282 (1967).

§ 1-54. One year.—Within one year an action or proceeding—

(1) Against a public officer, for a trespass under color of his office.

(2) Upon a statute, for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation.

(3) For libel, slander, assault, battery, or false imprisonment.

(4) Against a public officer, for the escape of a prisoner arrested or imprisoned on civil process.

(5) For the year's allowance of a surviving spouse or children.

(6) For a deficiency judgment on any debt, promissory note, bond or other evidence of indebtedness after the foreclosure of a mortgage or deed of trust on real estate securing such debt, promissory note, bond or other evidence of indebtedness, which period of limitation above prescribed commences with the date of the delivery of the deed pursuant to the foreclosure sale: Provided, however, that if an action on the debt, note, bond or other evidence of indebtedness secured would be earlier barred by the expiration of the remainder of any other period of limitation prescribed by this subchapter, that limitation shall govern. (C. C. P., s. 35; Code, s. 156; 1885, c. 96; Rev., s. 397; C. S., s. 443; 1933, c. 529, s. 1; 1951, c. 837, s. 2; 1965, c. 9; 1969, c. 1001, s. 2.)

Editor's Note.—

Prior to the 1965 amendment, subdivision (5) read "For a widow's year's allowance."

The 1969 amendment inserted "slander" in subdivision (3).

Session Laws 1969, c. 1001, s. 4, provides: "This act shall be effective upon ratification but shall apply only to causes of action accruing on or after ratification." The act was ratified June 23, 1969.

This section does not apply to causes of action for (1) tortious injury and damage to the automobile, and (2) for wrongful seizure and conversion of the tires. Reid v. Holden, 242 N.C. 408, 88 S.E.2d 125 (1955).

Actions under Antitrust Laws. — It is not clear whether § 1-54 (2) or § 1-52 (2) governs actions under the antitrust laws. It is clear, however, that in such cases, the sources of damage are separable for purposes of limitations. Miller Motors, Inc. v Ford Motor Co., 149 F. Supp. 790 (M.D.N.C. 1957).

Subdivision (2) of this section is not applicable in a right of action arising out of the federal antitrust statutes. Thompson v. North Carolina Theatres, Inc., 176 F. Supp. 73 (W.D.N.C. 1959).

Same — Action for False Imprisonment.—

A cause of action for false imprisonment is barred by this section after the expiration of one year from plaintiff's release from custody by the giving of bond, notwithstanding that the criminal prosecution in which the arrest took place continues within the limitation period. Mobley v. Broome, 248 N.C. 54, 102 S.E.2d 407 (1958).

Applied in Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952); as to subsection 3, Moser v. Fulk, 237 N.C. 302, 74 S.E.2d 729 (1953); Barnette v. Woody, 242 N.C. 424, 88 S.E.2d 223 (1955); Nowell v. Neal, 249 N.C. 516, 107 S.E.2d 107 (1959).

Stated in North Carolina Theatres, Inc. v. Thompson, 277 F.2d 673 (4th Cir. 1960).

Cited in United States v Lance, Inc., 95 F. Supp. 327 (W.D.N.C. 1951); Miller Motors, Inc. v. Ford Motor Co., 252 F.2d 441 (4th Cir. 1958); Johnson v. Graye, 251 N.C. 448, 111 S.E.2d 595 (1959); Waldron Buick Co. v. General Motors Corp., 254 N.C. 117, 118 S.E.2d 559 (1961); Jocie Motor Lines, Inc. v. International Bhd. of Teamsters, 260 N.C. 315, 132 S.E.2d 697 (1963); Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

§ 1-55. Six months.—Within six months an action—

(1) Upon a contract, transfer, assignment, power of attorney or other instrument transferring or affecting unearned salaries or wages, or future earnings, or any interest therein, whether said instrument be under seal or not under seal. The above period of limitation shall commence from the date of the execution of such instrument.

(2) For the wrongful conversion or sale of leaf tobacco in an auction tobacco warehouse during the regular season for auction sales of tobacco in such warehouse. This paragraph shall not apply to actions for the wrongful conversion or sale of leaf tobacco which was stolen from the lawful owner or possessor thereof. (C. C. P., s. 36; Code, s. 157; Rev., s. 398; C. S., s. 444; 1931, c. 168; 1943, c. 642, s. 2; 1969, c. 1001, s. 1.)

Editor's Note.—

The 1969 amendment deleted former subdivision (1), which read "For slander," and renumbered former subdivisions (2) and (3) as (1) and (2).

Session Laws 1969, c. 1001, s. 4, provides: "This act shall be effective upon ratification but shall apply only to causes of action accruing on or after ratification." The act was ratified June 23, 1969.

Cited in Johnson v. Graye, 251 N.C. 448, 111 S.E.2d 595 (1959).

ARTICLE 5A

Limitations, Actions Not Otherwise Limited.

§ 1-56. All other actions, ten years.

I. IN GENERAL.

Statute Runs between Spouses.—Statutes of limitation run as well between spouses as between strangers. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

When Nonsuit Proper.—Where a party against whom the statute has been pleaded fails to sustain the burden on him to show that limitations had not run against his cause of action, it is proper for the court to grant a motion for nonsuit. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Laches. — Where the action is barred by the applicable statute of limitations, the question of laches does not arise; when an action is not barred by the statute of limitations, equity will not bar relief on the ground of laches except upon special facts demanding exceptional relief. Howell v. Alexander, 3 N.C. App. 371, 165 S.E.2d 256 (1969).

Applied in Sandlin v. Weaver, 240 N.C. 703, 83 S.E.2d 806 (1954); Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953); Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

Cited in Quevedo v. Deans, 234 N.C. 618, 68 S.E.2d 275 (1951); Scott Poultry Co. v. Graves, 272 N.C. 22, 157 S.E.2d 608 (1967); Scott Poultry Co. v. Bryan Oil Co., 272 N.C. 16, 157 S.E.2d 693 (1967).

II. ACTIONS TO WHICH APPLICABLE.

The ten-year statute applies when the title to property is at issue, not where the action is merely for breach of contract, though the enforcing remedy, the equitable lien, is analogous to remedies for resort to which the statute of limitations is ten years. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

In an action to remove cloud on title in which defendants claim title by adverse possession, allegations in the answer pleading this section upon the assertion that plaintiffs' action accrued more than ten years prior to the commencement of the action are properly stricken as irrelevant. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966).

Where an action is for breach of contract and not one to establish a constructive or resulting trust, the action is barred after three years from defendant's categorical denial of plaintiff's rights. Parsons v Gunter, 266 N.C. 731, 147 S.E.2d 162 (1966).

A resulting or constructive trust, as distinguished from an express trust is governed by the ten-year and not the three-year statute of limitations. Bowen v Darden, 241 N.C. 11, 84 S.E.2d 289 (1954); Howell v. Alexander, 3 N.C. App. 371, 165 S.E.2d 256 (1969).

The period of limitations for actions in which the relief asked is the declaration of a constructive trust is determined by reference to the nature of the substantive right asserted. New Amsterdam Cas. Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

The institution of an action to enforce a resulting trust is governed by the ten-year statute New Amsterdam Cas. Co v. Waller, 301 F.2d 839 (4th Cir. 1962).

Were plaintiff the cestui que trust of a resulting or a constructive trust, the ten-year statute would apply. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

A constructive trust arises when land is acquired through fraud, or when, though acquired originally without fraud, it is against equity that land should be retained by him who holds it. Howell v. Alexander, 3 N.C. App. 371, 165 S.E.2d 256 (1969).

Claim for Services Where Compensation Was to Be Made by Will. — When personal services are rendered with the understanding that compensation is to be made in the will of the recipient, payment therefor does not become due until death and the statutes of limitations do not begin to run until that time Stewart v Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947).

SUBCHAPTER III PARTIES.

ARTICLE 6.

Parties.

§ 1-57 Real party in interest; grantees and assignees.

Cross References.

For provisions of Rules of Civil Procedure as to prosecuting claim in name of real party in interest, see Rule 17 (§ 1A-1).

I. REAL PARTIES IN INTEREST

A. In General.

Editor's Note.—For case law survey on pleading and parties, see 43 N.C.L. Rev. 873 (1965); 44 N.C.L. Rev. 897 (1966).

For comment on contribution among joint tort-feasors and rights of insurers, see 44 N.C.L. Rev. 142 (1965).

A motion in the cause is the prosecution of an action within the meaning of this section. Howard v. Boyce, 266 N.C. 572, 146 S.E.2d 828 (1966).

Plaintiff Must Be Real Party in Interest. —Before one can call on a court to redress or protect against a wrongful act done or threatened, he must allege that he is or will in some manner be adversely affected thereby He must be the real party in interest. State ex rel. East Lenoir Sanitary Dist. v. City of Lenoir, 249 N.C. 96, 105 S.E.2d 411 (1958).

For nearly a century North Carolina statutory law has required every action to be prosecuted in the name of the real party in interest. Howard v. Boyce, 266 N.C. 572, 146 S.E.2d 828 (1966).

A right of action accrues because of the wrong done plaintiff; he cannot maintain an action to redress a wrong done the other party to a contract Walker v Nicholson, 257 N.C. 744, 127 S.E.2d 564 (1962).

Who Is Real Party in Interest.—

A real party in interest is a party who is benefited or injured by the judgment in the case. Parnell v. Nationwide Mut. Ins. Co., 263 N.C. 445, 139 S.E.2d 723 (1965).

An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject matter of the litigation Parnell v. Nationwide Mut. Ins. Co., 263 N.C. 445, 139 S.E.2d 723 (1965).

Action Dismissed.—When it appears that the real party in interest is not before the court, the proceeding should be dismissed. Howard v. Boyce, 266 N.C. 572, 147 S.E.2d 828 (1966).

Sole Stockholder. — In a suit instituted by a corporation wherein all the stock was owned by one person, the sole stockholder was a real party in interest, and was a necessary party plaintiff. Park Terrace, Inc. v. Phoenix Indem. Co., 243 N.C. 595, 91 S.E.2d 584 (1956).

Administrator C. T. A. — Where notes were bequeathed to testator's widow for life and she, as executrix, distributed them to herself, and there was no evidence that they were not endorsed or that such distribution did not pass title to the notes from her as representative, plaintiff, as testator's administrator c. t. a., did not show that he was the real party in interest under this section to recover the notes from the widow's administrators. Upon distribution the property had inured to the benefit of the life tenant and remainder men and was not subject to further administration. Darden v. Boyette, 247 N.C. 26, 100 S.E.2d 359 (1957).

Allegations Disclosing Plaintiff Not Real Party in Interest.—In an action on a contract instituted by an individual, allegations that, although the contract was made in the name of plaintiff, the negotiations leading to the contract were carried on by a named corporation, that the contract was for the benefit of the corporation, and that plaintiff had assigned his interest in the contract to the corporation, without allegation that plaintiff was bringing the action as trustee for the corporation nor facts from which a trusteeship may be inferred, disclose that plaintiff is not the real party in interest and that he is without any right to maintain the action. Skinner v. Empresa Transformadora De Productos Agropecuarios, S. A., 252 N.C. 320, 113 S.E.2d 717 (1960).

Applied in First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

Cited in Locklear v. Oxendine, 233 N.C. 710, 65 S.E.2d 673 (1951); Bizzell v. Bizzell, 237 N.C. 535, 75 S.E.2d 536 (1953); Queen City Coach Co. v. Burrell, 241 N.C. 432, 85 S.E.2d 688 (1955); Hendrix v. B. & L. Motors, Inc., 241 N.C. 644, 86 S.E.2d 448 (1955); McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957); Adams v. Flora Macdonald College, 251 N.C. 617, 111 S.E.2d 859 (1960); Branch Banking & Trust Co. v. Bank of Washington, 255 N.C. 205, 120 S.E.2d 830 (1961); Gulf Life Ins. Co. v. Waters, 255 N.C. 553, 122 S.E.2d 387 (1961); Crawford v. General Ins. & Realty Co., 266 N.C. 615, 146 S.E.2d 651 (1966); State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968); State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968); Newsome v. Prudential Ins. Co. of America, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

B. Personal Actions.

Subrogated Insurer Must Sue in Its Own Name.—Where the insurance paid the insured covers the loss in full, the insurance company, as a necessary party plaintiff, must sue in its own name to enforce its right of subrogation against the tort-feasor. This is true because the insurance company in such case is entitled to the entire fruits of the action, and must be regarded as the real party in interest under this section Burgess v Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952), commented on in 31 N.C.L. Rev. 224 (1953); Milwaukee Ins. Co. v. McLean Trucking Co., 256 N.C. 721, [illegible] Shambley v. Jobe-Blackley Plumbing & Heating Co., 264 N.C. 456, 142 S.E.2d 18 (1965). See Taylor v. Green, 242 N.C. 156, 87 S.E.2d 11 (1955).

Where insured property is destroyed or damaged by the tortious act of a third party and the insurance company pays its insured, the owner, the full amount of his loss the insurance company is subrogated to the owner's (indivisible) cause of action against such third person. In such case the insurance company as the real party in interest under this section, may maintain such action in its name and for its benefit. Herring v. Jackson, 255 N.C. 537, 122 S.E.2d 366 (1961); Jewell v. Price, 259 N.C. 345, 130 S.E.2d 668 (1963).

An insurance company as plaintiff, may bring suit in its own name against parents of minor who set fire to school property upon a claim to which it has become subrogated by payment in full of its loss to the school board under the provisions of its policy of insurance, who, pursuant to the provisions of § 1-538.1, would have been able to bring such an action in its own name. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963)

Where there has been an accident involving an automobile insured against loss by collision or upset, the insurance company becomes a necessary party plaintiff and must sue in its own name to enforce its right of subrogation where it has paid the insured the loss in full. Security Fire & Indem. Co. v. Barnhardt, 267 N.C. 302, 148 S.E.2d 117 (1966).

And Not in Name of Injured Party.—An insurer paying the judgment obtained by the injured party against one tort-feasor has no right of action to enforce contribution against the other tort-feasor, and cannot acquire such right of action by the device of a "loan" to the injured party payable only in the event and to the extent of any recovery which the injured party may obtain against the other tort-feasor and in an action for contribution in the name of the injured party, maintained solely in the interest of the insurer, the injured party is not a real party in interest. Herring v. Jackson, 255 N.C. 537, 122 S.E.2d 366 (1961).

Where an insurance company pays the insured in part only for the loss sustained it is subrogated pro tanto in equity to the rights of the insured against the tort-feasor and by virtue of that fact it holds an equitable interest in the subject matter of the action and becomes a proper although not a necessary party to the litigation. Taylor v. Green, 242 N.C. 156, 87 S.E.2d 11 (1955).

Where there has been an accident involving an automobile insured against loss by collision or upset, the insured is a necessary party plaintiff where the insurance company has paid only a portion of the loss. Security Fire & Indem. Co. v. Barnhardt, 267 N.C. 302, 148 S.E.2d 117 (1966).

Liability Insurance Carrier Not Proper Party Defendant.—In an action ex delicto for damages proximately caused by the alleged negligence of the defendant, his liability insurance carrier is not a proper party defendant. Taylor v. Green, 242 N.C. 156, 87 S.E.2d 11 (1955).

Generally an employee may maintain an action to enforce provisions inserted for his benefit in a collective labor contract made between a labor union and the employer, particularly in regard to wage provisions. Lammonds v. Aleo Mfg. Co., 243 N.C. 749, 92 S.E.2d 143 (1956).

Plaintiff employee alleged the existence of a collective labor contract between defendant and a labor union, that plaintiff was required to work under an increased work load assignment in violation of the contract, and that such violation entitled plaintiff to back pay under the terms of the contract. It was held that the complaint states a cause of action in plaintiff's favor as a third party beneficiary. Lammonds v. Aleo Mfg. Co., 243 N.C. 749, 92 S.E.2d 143 (1956).

Agent as Real Party in Interest.—

The appointment of an agent does not divest the owner of his property rights. The agent is not the real party in interest and cannot maintain an action. Morton v. Thornton, 259 N.C. 697, 131 S.E.2d 378 (1963).

An agent is not the real party in interest and cannot maintain an action. Parnell v. Nationwide Mut. Ins. Co., 263 N.C. 445, 139 S.E.2d 723 (1965).

Since the enactment of this section it has been consistently held that an agent for another could not maintain an action in his name for the benefit of his principal. Howard v. Boyce, 266 N.C. 572, 146 S.E.2d 828 (1966).

III. ASSIGNMENTS.

Assignment Defined.—An assignment is substantially a transfer, actual or constructive with the clear intent at the time to part with all interest in the thing transferred and with a full knowledge of the rights so transferred. Morton v. Thornton, 259 N.C. 697, 131 S.E.2d 378 (1963).

Effect in General.—

In accord with 1st paragraph in original. See Standard Amusement Co. v. Tarkington, 247 N.C. 444, 101 S.E.2d 398 (1958).

The one to whom there has been an absolute assignment is the "real party in interest" rather that the assignor who has parted with all interest therein. Commerce Mfg. Co. v. Blue Jeans Corp., 146 F. Supp. 15 (E.D.N.C. 1956).

An assignee of a contractual right is a real party in interest and may maintain the action. Morton v. Thornton, 259 N.C. 697, 131 S.E.2d 378 (1963).

Assignee Sues in Own Name.—

If the assignee elected to sue on the judgment, the action could only be maintained in the name of the assignee. Safeco Ins. Co. of America v. Nationwide Mut. Ins. Co., 264 N.C. 749, 142 S.E.2d 694 (1965).

Assignor of Bank Deposit May Not Maintain Action.—As a consequence of the requirement that every action be prosecuted in the name of the real party in interest, a depositor cannot maintain an action against a bank to recover a deposit when it appears from his own evidence that he has assigned the deposit to a third person and has no further interest in it. Lipe v. Guilford Nat'l Bank, 236 N.C. 328, 72 S.E.2d 759 (1952).

Assignee Takes Subject to Set-Offs and Other Defenses.—An assignee of a chose in action is by this section given the right to maintain the action in his name but that right is circumscribed by the express provision that it shall be without prejudice to any offset or other defense existing at the time of the assignment. Overton v.

Tarkington, 249 N.C. 340, 106 S.E.2d 717 (1959).

Where plaintiff, according to the allegations of its complaint, became the assignee of a lease, a non-negotiable chose in action, it took it subject to any set-off or other defense which the lessees may have had against its assignors based on facts existing at the time of, or before notice of, the assignment, even though it bought it for value, and in good faith. Standard Amusement Co. v. Tarkington, 247 N.C. 444, 101 S.E.2d 398 (1958).

A claim for unpaid wages is a chose in action which may be assigned and when assigned the assignee may maintain an action thereon in his own name. Morton v. Thornton, 257 N.C. 259, 125 S.E.2d 464 (1962).

§ 1-61: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-63: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 17 of the Rules of Civil Procedure (§ 1A-1).

§ 1-64: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 17 of the Rules of Civil Procedure (§ 1A-1).

§§ 1-65 to 1-65.4: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Editor's Note. — Session Laws 1955, c. 1366, amended former § 1-65 by changing its number to 1-65.1 and by adding §§ 1-65.2 to 1-65.4. Former § 1-65.1 was amended by Session Laws 1957, c. 249. For provisions similar to those of the repealed sections, see section (b), Rule 17 of the Rules of Civil Procedure (§ 1A-1).

§ 1-65.5: Repealed by Session Laws 1969, c. 895, s. 19.

Editor's Note. — Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

§ 1-66: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 17 of the Rules of Civil Procedure (§ 1A-1).

§ 1-67: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-68: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References.—As to necessary joinder of parties, see Rule 19 of the Rules of Civil Procedure (§ 1A-1). As to permissive joinder of parties, see Rule 20 of the Rules of Civil Procedure (§ 1A-1).

§ 1-69: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References.—As to necessary joinder of parties, see Rule 19 of the Rules of Civil Procedure (§ 1A-1). As to permissive joinder of parties, see Rule 20 of the Rules of Civil Procedure (§ 1A-1).

§ 1-69.1. Unincorporated associations; suit by or against.—All unincorporated associations, organizations or societies, foreign or domestic, whether organized for profit or not, may hereafter sue or be sued under the name by which they are commonly known and called, or under which they are doing business, to the same extent as any other legal entity established by law and without naming any of the individual members composing it. Any judgments and executions against any such association, organization or society shall bind its real and personal property in like manner as if it were incorporated. This section shall not apply to partnerships or co-partnerships which are organized to engage in any business, trade or profession. (1955, c. 545, s. 3.)

Not Retroactive. — This section does not apply to actions filed prior to its effective date. Youngblood v. Bright, 243 N.C. 599, 91 S.E.2d 559 (1956).

The words "sue" and "be sued" used in this statute include the natural and appropriate incidents of legal proceedings and embrace all civil process incident to the commencement or continuance of legal proceedings. J.A. Jones Constr. Co. v. Local Union 755, 246 N.C. 481, 98 S.E.2d 852 (1957).

Service of Process. — No provision of this section purports to prescribe the manner in which service of process is to be made on such unincorporated association. The only statute prescribing the manner in which such service may be made is § 1-97 (6). Melton v. Hill, 251 N.C. 134, 110 S.E.2d 875 (1959).

An unincorporated labor union, which is doing business in North Carolina by performing acts for which it was formed is suable in this State as a separate legal entity. J.A. Jones Constr. Co. v. Local Union 755, 246 N.C. 481, 98 S.E.2d 852 (1957).

An unincorporated labor union doing business in North Carolina by performing acts for which it was formed can sue and be sued as a separate legal entity in the courts of this State, and may be served with process in the manner prescribed by statute. Martin v. Local 71, International Bhd. of Teamsters, 248 N.C. 409, 103 S.E.2d 462 (1958); Gainey v. Local 71, International Bhd. of Teamsters, 252 N.C. 256, 113 S.E.2d 594 (1960).

An unincorporated labor union may be sued in the courts of this State as a legal entity separate and apart from its members. R.H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO, 270 N.C. 160, 154 S.E.2d 344 (1967).

An unincorporated labor union, as a legal entity separate and apart from its members, may be held liable in damages for torts committed by its employees or agents acting in the course of their employment. R.H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO, 270 N.C. 160, 154 S.E.2d 344 (1967).

Evidence was sufficient to support a finding that a labor union was doing business in North Carolina by performing some of the acts for which it was formed. Reverie Lingerie, Inc. v. McCain, 258 N.C. 353, 128 S.E.2d 835 (1963).

Applied in Sizemore v. Maroney, 263 N.C. 14, 138 S.E.2d 803 (1964).

Cited in Solon Lodge v Ionic Lodge, 245 N.C. 281, 95 S.E.2d 921 (1957); Glover v. Brotherhood of Railway & Steamship Clerks, 250 N.C. 35, 108 S.E.2d 78 (1959); Walker v. Nicholson, 257 N.C. 744, 127 S.E.2d 564 (1962); Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ., 4 N.C. App. 617, 167 S.E.2d 538 (1969).

§ 1-70: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References.—As to joinder of parties, see Rules 19 and 20 of the Rules of Civil Procedure (§ 1A-1). As to class actions, see Rule 23 of the Rules of Civil Procedure (§ 1A-1).

§ 1-71: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to permissive joinder of parties, see Rule 20 of the Rules of Civil Procedure (§ 1A-1).

§ 1-72. Persons jointly liable.

Cross Reference.—For another provision that in all cases of joint contracts, a claim may be asserted against all or any number of the persons making such contracts, see Rule 19 of the Rules of Civil Procedure (§ 1A-1).

Nonsuit against One Alleged Party to Contract Does Not Constitute Variance Justifying Nonsuit against the Other. — When an action is brought against more than one defendant on what is alleged to be a joint contract, and the evidence shows that the agreement was made with only one defendant, nonsuit against the other defendants does not constitute a variance which justifies a nonsuit against the defendant with whom the agreement was made. The existence of other defendants is not an essential element of the contract. Tillis v. Calvine Cotton Mills, Inc., 251 N.C. 359, 111 S.E.2d 606 (1959).

§ **1-73**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References.—For provisions similar to those of the first sentence of repealed § 1-73, see Rule 19 of the Rules of Civil Procedure (§ 1A-1). As to interpleader, see Rule 22 of the Rules of Civil Procedure (§ 1A-1).

§ **1-74**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of repealed § 1-74, see Rule 25 of the Rules of Civil Procedure (§ 1A-1).

§ **1-75**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

SUBCHAPTER IIIA. JURISDICTION.

ARTICLE 6A.

Jurisdiction.

§ **1-75.1. Legislative intent.**—This article shall be liberally construed to the end that actions be speedily and finally determined on their merits. The rule that statutes in derogation of the common law must be strictly construed does not apply to this article. (1967, c. 954, s. 2.)

Effective Date of Article.—Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Editor's Note.—For article on jurisdiction and process, see 5 Wake Forest Intra. L. Rev. 46 (1969).

§ **1-75.2. Definitions.**—In this article the following words have the designated meanings:

(1) "Person" means any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society which may sue or be sued under a common name.

(2) "Plaintiff" means the person named as plaintiff in a civil action, and where in this article acts of the plantiff are referred to, the reference includes the acts of his agent within the scope of the agent's authority.

(3) "Defendant" means the person named as defendant in a civil action, and where in this article acts of the defendant are referred to, the reference includes any person's acts for which the defendant is legally responsible. In determining for jurisdictional purposes the defendant's legal responsibility for the acts of another, the substantive liability of the defendant to the plaintiff is irrelevant.

(4) Where jurisdiction of the person is drawn into question in respect to any claim asserted under Rule 14 of the Rules of Civil Procedure, the terms "Plaintiff" and "Defendant" as above defined shall include a third-party plaintiff and a third-party defendant respectively. (1967, c. 954, s. 2.)

Editor's Note.—The Rules of Civil Procedure are found in § 1A-1.

§ 1-75.3. Jurisdictional requirements for judgments against persons, status and things.—(a) Jurisdiction of Subject Matter Not Affected by This Article.—Nothing in this article shall be construed to confer, enlarge or diminish the subject matter jurisdiction of any court.

(b) Personal Jurisdiction.—A court of this State having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in § 1-75.4 or § 1-75.7 and in addition either:

(1) Personal service or substituted personal service of summons, or service of publication of a notice of service of process is made upon the defendant pursuant to Rule 4 (j) of the Rules of Civil Procedure; or

(2) Service of a summons is dispensed with under the conditions in § 1-75.7.

(c) Jurisdiction in Rem or Quasi in Rem.—A court of this State having jurisdiction of the subject matter may render a judgment in rem or quasi in rem upon a status or upon a property or other things pursuant to § 1-75.8 and the judgment in such action may affect the interests in the status, property or thing of all persons served pursuant to Rule 4 (k) of the Rules of Civil Procedure. (1967, c. 954, s. 2.)

Editor's Note.—The Rules of Civil Procedure are found in § 1A-1.

§ 1-75.4. Personal jurisdiction, grounds for generally.—A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4 (j) of the Rules of Civil Procedure under any of the following circumstances:

(1) Local Presence or Status.—In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:

a. Is a natural person present within this State; or

b. Is a natural person domiciled within this State; or

c. Is a domestic corporation; or

d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

(2) Special Jurisdiction Statutes.—In any action which may be brought under statutes of this State that specifically confer grounds for personal jurisdiction.

(3) Local Act or Omission.—In any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.

(4) Local Injury; Foreign Act.—In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:

a. Solicitation or services activities were carried on within this State by or on behalf of the defendant; or

b. Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed within this State in the ordinary course of trade.

(5) Local Services, Goods or Contracts.—In any action which:

a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or

b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; or

c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or

d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction; or

e. Relates to goods, documents of title, or other things of value actually received by the plaintiff in this State from the defendant through a carrier without regard to where delivery to the carrier occurred.

(6) Local Property.—In any action which arises out of:

a. A promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to create in either party an interest in, or protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this State; or

b. A claim to recover for any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this State either at the time of the first use, ownership, control or possession or at the time the action is commenced; or

c. A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this State at the time the defendant acquired possession or control over it.

(7) Deficiency Judgment on Local Foreclosure or Resale.—In any action to recover a deficiency judgment upon an obligation secured by a mortgage, deed of trust, conditional sale, or other security instrument executed by the defendant or his predecessor to whose obligation the defendant has succeeded and the deficiency is claimed either:

a. In an action in this State to foreclose such security instrument upon real property, tangible personal property, or an intangible represented by an indispensable instrument, situated in this State; or

b. Following sale of real or tangible personal property or an intangible represented by an indispensable instrument in this State under a power of sale contained in any security instrument.

(8) Director or Officer of a Domestic Corporation.—In any action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of such corporation while the defendant held office as a director or officer.

(9) Taxes or Assessments.—In any action for the collection of taxes or assessments levied, assessed or otherwise imposed by a taxing authority of this State after the date of ratification of this act.

(10) Insurance or Insurers.—In any action which arises out of a contract of insurance as defined in G.S. 58-3 made anywhere between the plaintiff or some third party and the defendant and in addition either:

a. The plaintiff was a resident of this State when the event occurred out of which the claim arose; or

b. The event out of which the claim arose occurred within this State, regardless of where the plaintiff resided.

(11) Personal Representative.—In any action against a personal representative to enforce a claim against the deceased person represented,

whether or not the action was commenced during the lifetime of the deceased, where one or more of the grounds stated in subdivision (2) to (10) of this section would have furnished a basis for jurisdiction over the deceased had he been living. (1967, c. 954, s. 2.)

Editor's Note.—Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

§ 1-75.5. Joinder of causes in the same action.—In any action brought in reliance upon jurisdictional grounds stated in subdivisions (2) to (10) of § 1-75.4 there cannot be joined in the same action any other claim or cause against the defendant unless grounds exist under § 1-75.4 for personal jurisdiction over the defendant as to the claim or cause to be joined. (1967, c. 954, s. 2.)

§ 1-75.6. Personal jurisdiction—manner of exercising by service of process. — A court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in § 1-75.4 may exercise personal jurisdiction over a defendant by service of process in accordance with the provisions of Rule 4 (j) of the Rules of Civil Procedure. (1967, c. 954, s. 2.)

Editor's Note.—The Rules of Civil Procedure are found in § 1A-1.

§ 1-75.7. Personal jurisdiction — grounds for without service of summons.—A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person:

(1) Who makes a general appearance in an action; or

(2) With respect to any counterclaim asserted against that person in an action which he has commenced in this State. (1967, c. 954, s. 2.)

§ 1-75.8. Jurisdiction in rem or quasi in rem — grounds for generally.—A court of this State having jurisdiction of the subject matter may exercise jurisdiction in rem or quasi in rem on the grounds stated in this section. A judgment in rem or quasi in rem may affect the interests of a defendant in a status, property or thing acted upon only if process has been served upon the defendant pursuant to Rule 4 (k) of the Rules of Civil Procedure. Jurisdiction in rem or quasi in rem may be invoked in any of the following cases:

(1) When the subject of the action is real or personal property in this State and the defendant has or claims any lien or interest therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein. This subdivision shall apply whether any such defendant is known or unknown.

(2) When the action is to foreclose, redeem from or satisfy a deed of trust, mortgage, claim or lien upon real or personal property in this State.

(3) When the action is for a divorce or for annulment of marriage of a resident of this State.

(4) When the defendant has property within this State which has been attached or has a debtor within the State who has been garnished. Jurisdiction under this subdivision may be independent of or supplementary to jurisdiction acquired under subdivisions (1), (2) and (3) of this section.

(5) In any other action in which in rem or quasi in rem jurisdiction may be constitutionally exercised. (1967, c. 954, s. 2.)

Editor's Note.—The Rules of Civil Procedure are found in § 1A-1.

§ 1-75.9. Jurisdiction in rem or quasi in rem—manner of exercising.—A court of this State exercising jurisdiction in rem or quasi in rem pursuant to § 1-75.8 may affect the interests of a defendant in such an action only if process has been served upon the defendant in accordance with the provisions of Rule 4 (k) of the Rules of Civil Procedure, but nothing herein shall prevent the court from making interlocutory orders for the protection of the res while the action is pending. (1967, c. 954, s. 2.)

Editor's Note.—The Rules of Civil Procedure are found in § 1A-1.

§ 1-75.10. Proof of service of summons, defendant appearing in action.—Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:

(1) Personal Service or Substituted Personal Service.—
  a. If served by the sheriff of the county or the lawful process officer in this State where the defendant was found, by the officer's certificate thereof, showing place, time and manner of service; or
  b. If served by any other person, his affidavit thereof, showing place, time and manner of service; his qualifications to make service under Rule 4 (a) or Rule 4 (j) (9) d of the Rules of Civil Procedure; that he knew the person served to be the party mentioned in the summons and delivered to and left with him a copy; and if the defendant was not personally served, he shall state in such affidavit when, where and with whom such copy was left. If such service is made outside this State, the proof thereof may in the alternative be made in accordance with the law of the place where such service is made.

(2) Service of Publication.—In the case of publication, by the affidavit of the publisher or printer, or his foreman or principal clerk, showing the same and specifying the date of the first and last publication, and an affidavit of mailing of a copy of the complaint or notice, as the case may require, made by the person who mailed the same.

(3) Written Admission of Defendant. — The written admission of the defendant, whose signature or the subscription of whose name to such admission shall be presumptive evidence of genuineness. (1967, c. 954, s. 2; 1969, c. 895, s. 14.)

Editor's Note.—The 1969 amendment rewrote paragraph b of subdivision (1).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

The Rules of Civil Procedure are found in § 1A-1.

§ 1-75.11. Judgment against nonappearing defendant, proof of jurisdiction.—Where a defendant fails to appear in the action within apt time the court shall, before entering a judgment against such defendant, require proof of service of the summons in the manner required by § 1-75.10 and, in addition, shall require further proof as follows:

(1) Where Personal Jurisdiction Is Claimed Over the Defendant.—Where a personal claim is made against the defendant, the court shall require proof by affidavit or other evidence, to be made and filed, of the existence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over the defendant. The court may require such additional proof as the interests of justice require.

(2) Where Jurisdiction Is in Rem or Quasi in Rem.—Where no personal

claim is made against the defendant, the court shall require such proofs, by affidavit or otherwise, as are necessary to show that the court's jurisdiction has been invoked over the status, property or thing which is the subject of the action. The court may require such additional proof as the interests of justice require. (1967, c. 954, s. 2.)

§ 1-75.12. Stay of proceeding to permit trial in a foreign jurisdiction.—(a) When Stay May be Granted.—If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State. A moving party under this subsection must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial.

(b) Subsequent Modification of Order to Stay Proceedings.—In a proceeding in which a stay has been ordered under this section, jurisdiction of the court continues for a period of five years from the entry of the last order affecting the stay; and the court may, on motion and notice to the parties, modify the stay order and take such action as the interests of justice require. When jurisdiction of the court terminates by reason of the lapse of five years following the entry of the last order affecting the stay, the clerk shall without notice enter an order dismissing the action.

(c) Review of Rulings on Motion.—Whenever a motion for a stay made pursuant to subsection (a) above is granted, any nonmoving party shall have the right of immediate appeal. Whenever such a motion is denied, the movant may seek review by means of a writ of certiorari and failure to do so shall constitute a waiver of any error the judge may have committed in denying the motion. (1967, c. 954, s. 2.)

SUBCHAPTER IV VENUE.

ARTICLE 7.

Venue.

§ 1-76. Where subject of action situated.

I. IN GENERAL.

Local and Transitory Actions Distinguished.—If the judgment to which plaintiff would be entitled upon the allegations of the complaint will affect the title to land, the action is local and must be tried in the county where the land lies unless defendant waives the proper venue; otherwise, the action is transitory and must be tried in the county where one or more of the parties reside at the commencement of the action. Thompson v. Horrell, 272 N.C. 503, 158 S.E.2d 633 (1968).

Applied in Casstevens v. Wilkes Tel. Membership Corp., 254 N.C. 746, 120 S.E.2d 94 (1961).

Cited in Evans v. Morrow, 233 N.C. 562, 64 S.E.2d 842 (1951); Owens v. Boling, 274 N.C. 374, 163 S.E.2d 396 (1968).

II. ACTIONS RELATING TO REAL PROPERTY.

Injuries to Land.—

Action to recover damages to real property is transitory. Wheatley v. Phillips, 228 F. Supp. 439 (W.D.N.C. 1964).

Action for Damages for Breach of Contract.—Where the plaintiff in his complaint does not undertake to allege facts to support a decree for specific performance. but on the contrary bottoms his action on the breach of the contract, and seeks to recover damages resulting therefrom, such an action is not for the recovery of real property or any interest therein as contemplated by this section. Lamb v. Staples, 234 N.C. 166, 66 S.E.2d 660 (1951).

Action to Enforce Contract Rights under Lease.—Where plaintiff brought an action to obtain a decree in personam to enforce contractual rights under a lease, and judgment would not alter the terms of the lease, require notice to third parties, or affect title to the land, the defendant's motion to remove as a matter of right to the county in which the land is situate was properly denied. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967).

Venue of action against regional housing authority to determine respective rights of parties in certain land is properly the county in which the realty is situated and in which the authority has express power to act, notwithstanding that the principal office of the authority is in another county. Powell v. Eastern Carolina Regional Housing Authority, 251 N.C. 812, 112 S.E.2d 386 (1960).

Removal of Action, etc.—

When the title to real estate may be affected by an action, the action is local and removable to the county where the land is situate by proper motion made in apt time. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967); Goodyear Mtg. Corp. v. Montclair Dev. Corp., 2 N.C. App. 138, 162 S.E.2d 623 (1968).

V. RECOVERY OF PERSONAL PROPERTY.

Removal for Convenience of Witnesses.—Once a cause involving recovery of personal property is properly instituted, this section does not prevent the seeking of a removal for the convenience of witnesses, and whether the motion to remove should be granted is a matter in the discretion of the court. Moody v. Warren-Robbins, Inc., 251 N.C. 172, 110 S.E.2d 866 (1959).

Applied in Dubose v. Harpe, 239 N.C. 672, 80 S.E.2d 454 (1954).

§ 1-77. Where cause of action arose.

Any consideration of subdivision (2) involves two questions: (1) Is defendant a "public officer or person especially appointed to execute his duties"? (2) In what county did the cause of action in suit arise? Coats v. Sampson County Mem. Hosp., Inc., 264 N.C. 332, 141 S.E.2d 490 (1965).

Officers of Counties and Cities.—

Actions against counties must be brought in the county sued. Coats v. Sampson County Mem. Hosp., Inc., 264 N.C. 332, 141 S.E.2d 490 (1965).

Action against Municipality Is Action against Public Officer.—

In accord with original. See Lee v. Poston, 233 N.C. 546, 64 S.E.2d 835 (1951).

County Hospital Held An Agency of the County.—See Coats v. Sampson County Mem. Hosp., Inc., 264 N.C. 332, 141 S.E.2d 490 (1965).

Section Not Applicable to Religious Corporation.—See Lee v. Poston, 233 N.C. 546, 64 S.E.2d 835 (1951).

Injurious Results Taking Effect in Another County.—Where the cause of an alleged grievance is situate or exists in one state or county, and the injurious results take effect in another, the courts of the former have jurisdiction. Powell v. Eastern Carolina Regional Housing Authority, 251 N.C. 812, 112 S.E.2d 386 (1960).

Cited in Mitchell v. Jones, 272 N.C. 499, 158 S.E.2d 706 (1968).

§ 1-78. Official bonds executors and administrators.

The proper venue for actions against executors and administrators is the county in which they qualify. Lichtenfels v. North Carolina Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963).

Section Includes Guardians.—This section has been held to include guardians notwithstanding the only words used are "executors" and "administrators." Lichtenfels v. North Carolina Nat'l Bank 260 N.C. 146, 132 S.E.2d 360 (1963), citing State ex rel. Cloman v. Staton, 78 N.C. 235 (1878).

And All Court-Appointed Fiduciaries Required to Account to Court Appointing Them.—This section is limited to actions against executors and administrators; but there can be no doubt that the legislature intended the words used to encompass all fiduciaries, irrespective of technical titles, who act by reason of a court appointment and are by law required to account to the court appointing them. Lichtenfels v. North Carolina Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963).

Representative Is Not Entitled to Removal If Not Sued in His Official Capacity.—The fact that an executor or administrator is sued and the defendant is named as such executor or administrator in the summons caption and complaint, does not entitle such defendant to an order of removal to the county in which he qualified if the complaint discloses the alleged cause of action is not against such executor or administrator in his official capacity. Davis v. Singleton, 256 N.C. 596, 124 S.E.2d 563 (1962).

When Action Is against Representative in Official Capacity.—An action is against the representative in his official capacity if it: (a) Asserts a claim against the estate; (b) involves the settlement of his accounts; or (c) involves the distribution of the estate. Davis v. Singleton, 256 N.C. 596, 124 S.E.2d 563 (1962).

"Instituted."—

This section applies to original actions "instituted," i. e., originally commenced, against personal representatives, and not to actions already pending in which it may be proper or necessary to make them parties. Evans v. Morrow, 233 N.C. 562, 64 S.E.2d 842 (1951).

A national bank, by qualifying as a testamentary trustee, waives any right to have an action for an accounting, instituted against it in the county in which the will was probated, removed to the county in which it maintains its principal office. Lichtenfels v. North Carolina Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963).

Cited in Evans v. Morrow, 234 N.C. 600, 68 S.E.2d 258 (1951); Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

§ **1-79. Domestic corporations.**—For the purpose of suing and being sued the residence of a domestic corporation is as follows:

(1) Where the registered office of the corporation is located.

(2) If the corporation having been formed prior to July 1, 1957 does not have a registered office in this State, but does have a principal office in this State, its residence is in the county where such principal office is said to be located by its certificate of incorporation, or amendment thereto, or legislative charter. (1903, c. 806; Rev., s. 422; C. S., s. 466; 1951, c. 837, s. 5; 1957, c. 492.)

Editor's Note.—

The 1957 amendment rewrote this section

"Principal Office."—

The words "principal place of business," formerly used in this section are regarded as synonymous with the words 'principal office" as used in § 55-2, requiring the location of the principal office in this State to be set forth in the certificate of incorporation by which the corporation is formed. Howle v. Twin States Express, Inc., 237 N.C. 667, 75 S.E.2d 732 (1953); Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

Section Does Not Apply to Foreign Insurance Companies.—While statutes relating to suits in behalf of or against domestic corporations and foreign corporations which have submitted to domestication must be read in pari materia, the provisions of this section have no application to foreign insurance companies, since § 58-150 does not require a foreign insurance company to file a statement in the office of the Commissioner of Insurance setting forth its principal place of business Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

Where findings of fact showed that a foreign insurance company had no registered or principal office located in Wake County, it was not entitled as a matter of right to have an action removed for trial to Wake County by virtue of this section. Crain & Denbo, Inc v Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

Stated in Haworth v. General Motors Acceptance Corp., 238 F.2d 203 (4th Cir. 1956); Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

§ **1-80. Foreign corporations.**

Quoted in Troy Lumber Co. v. State Sewing Mach. Corp., 233 N.C. 407, 64 S.E.2d 415 (1951).

Cited in Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

§ **1-82. Venue in all other cases.**—In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them reside at its commencement, or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in his summons and complaint, subject to the power of the court to change the place of trial, in the cases provided by statute; provided that any person who has resided on or been stationed in a United States army, navy, marine corps, coast guard or air force installation or reservation within this State for a period of one (1) year or more next preceding the institution of an action shall be deemed a resident of the county within which such installation or reservation, or part thereof, is situated and of any county adjacent to such county where such person stationed at such installation or reservation lives in such adjacent county, for the purposes of this section. The term person shall include military personnel and the spouses and dependents of such personnel. (C. C. P., s. 68; 1868-9, cc. 59, 277; Code, s. 192; 1905, c. 367; Rev., s. 424; C. S., s. 469; 1957, c. 1082.)

Editor's Note.—

The 1957 amendment added the proviso and the last sentence.

Local and Transitory Actions Distinguished.—If the judgment to which plaintiff would be entitled upon the allegations of the complaint will affect the title to land, the action is local and must be tried in the county where the land lies unless defendant waives the proper venue; otherwise, the action is transitory and must be tried in the county where one or more of the parties reside at the commencement of the action. Thompson v. Horrell, 272 N.C. 503, 158 S.E.2d 633 (1968).

Action for alimony without divorce under § 50-16 must be tried in the county in which the plaintiff or defendant resided at commencement of suit. Burrell v. Burrell, 243 N.C. 24, 89 S.E.2d 732 (1955).

Action by Domesticated Foreign Corporation.—The proper venue for an action instituted by a foreign corporation domesticated in this State is in the county in which it maintains its principal place of business. Aetna Cas. & Sur. Co. v. Petroleum Transit Co., 266 N.C. 756, 147 S.E.2d 229 (1966).

Residence of Foreign Insurance Company.—Where findings of fact showed that a foreign insurance company maintained a supervisory office in Mecklenburg County, and that that office supervised all of the local and special agents and adjusters of the company throughout the State, the findings showed that the insurance company, for purposes of venue, was not a resident of Wake County, within the purview of this section. Crain & Denbo, Inc v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

Denial of Motion for Removal.—In order to deny a motion for removal to a county which is not a proper venue, it is not required that the trial court determine what is the proper county for the trial. Doss v. Nowell, 268 N.C. 289, 150 S.E.2d 394 (1966).

Where the evidence is sufficient to support the court's findings that plaintiff, a nonresident corporation, had domesticated in this State and had brought the action in the county in which it maintained its principal place of business in North Carolina, denial of defendant's motion for change of venue will not be disturbed. Aetna Cas. & Sur. Co. v. Petroleum Transit Co., 266 N.C. 756, 147 S.E.2d 229 (1966).

Applied in Brendle v. Stafford, 246 N.C. 218, 97 S.E.2d 843 (1957).

Stated in Mitchell v. Jones, 272 N.C. 499, 158 S.E.2d 706 (1968).

Cited in Lee v. Poston, 233 N.C. 546, 64 S.E.2d 835 (1951); Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

§ 1-83. Change of venue.

II. The Application for Removal.
  C. Form and Contents of Demand.

I. IN GENERAL.

Editor's Note.—

For case law survey on venue, see 41 N.C.L. Rev. 525 (1963).

The word "venue," as used in this section, means place of trial, the place or county where the trial of a cause is to be held. The authority thus vested in the superior court judge to remove a cause instituted in a county which "is not the proper one," as provided by the statute fixing the venue of actions, is the power to change the place of trial. The trial, nonetheless, is to be had in the same court which ordered its removal—the superior court. Lovegrove v. Lovegrove, 237 N.C. 307, 74 S.E.2d 723 (1953).

Venue is not jurisdictional, but is only ground for removal to the proper county, if objection thereto is made in apt time and in the proper manner Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952); Casstevens v. Wilkes Tel. Membership Corp., 254 N.C. 746, 120 S.E.2d 94 (1961).

Action Instituted in Wrong County Should Be Removed, Not Dismissed.—When an action is instituted in the wrong county, the superior court should, upon apt motion, remove the action, not dismiss it. Coats v. Sampson County Mem. Hosp., Inc., 264 N.C. 332, 141 S.E.2d 490 (1965).

Demand for change of venue must be made by the defendant. Nello L Teer Co v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

By adding subdivision 4 to this section, the legislature construed the existing statute as not giving a plaintiff the right to have an action voluntarily instituted by him, in an improper county, removed to one of proper venue. Nello L Teer Co v.

Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

Denial of Motion for Removal.—In order to deny a motion for removal to a county which is not a proper venue, it is not required that the trial court determine what is the proper county for the trial. Doss v. Nowell, 268 N.C. 289, 150 S.E.2d 394 (1966).

Applied in Davis v. Singleton, 256 N.C. 596, 124 S.E.2d 563 (1962); Slater v. Lovick, 257 N.C. 619, 127 S.E.2d 273 (1962).

Cited in Owens v. Boling, 274 N.C. 374, 163 S.E.2d 396 (1968).

II. THE APPLICATION FOR REMOVAL.

A. Time of Demand.

This section is explicit, etc.

In accord with 1st paragraph in original See Nello L Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

Before Time for Filing Answer.—

A motion for change of venue made before the time for answer has expired is made in apt time. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967).

Demand must be made before the time of answering expires, and before the answer is filed Nello L Teer Co v Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

C. Form and Contents of Demand.

The demand must be in writing. Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

III. WAIVER OF RIGHT TO CHANGE.

Effect of Failure to Comply with Section.—

If the county designated for the purpose of summons and complaint is not the proper one, the action may be tried therein unless the defendant, before the time for answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of the parties, or by order of the court. Nelms v Nelms, 250 N.C. 237, 108 S.E.2d 529 (1959).

Venue, not being jurisdictional, may be waived by any party, including the government. Nello L Teer Co v Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

Filing Answer to Merits.—

In accord with original See Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

An Agreement between Counsel, etc.

In accord with original. See Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

Where plaintiff voluntarily institutes an action in an improper county and files his complaint and obtains service on the defendant, he thereby waives his right to have the action removed to the county of his residence. Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

IV. APPEAL.

A. Where County Designated Not Proper.

No Discretion in Court.—

If the demand for removal is properly made, and it appears that the action has been brought in the wrong county, the court has no discretion as to removal It is a right which the defendant may assert and which the court cannot deny, if properly asserted. The word "may" is construed "must" and from a refusal of the right to remove the defendant may appeal Nello L Teer Co v Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

When demand is made in apt time, and in the required manner, the court has no discretion as to removal. Mitchell v. Jones, 272 N.C. 499, 158 S.E.2d 706 (1968).

Not Premature.—

An appeal from a ruling on a motion for a change of venue under § 1-77 is not premature. Coats v. Sampson County Mem. Hosp., Inc., 264 N.C. 332, 141 S.E.2d 490 (1965).

B. Convenience of Witnesses and Ends of Justice Promoted.

Discretion of Court.—

In accord with 3rd paragraph in original. See Farmers Cooperative Exch., Inc. v. Trull, 255 N.C. 202, 120 S.E.2d 438 (1961).

Until the allegations of the complaint are traversed, the occasion for the exercise of discretion will not arise upon the motion for removal for the convenience of witnesses and the promotion of justice. Thompson v. Horrell, 272 N.C. 503, 158 S.E.2d 633 (1968), commented on in 47 N.C.L. Rev. 269 (1968).

§ 1-84. Removal for fair trial.—In all civil and criminal actions in the superior and criminal courts when it is suggested on oath or affirmation, on behalf of the State or the traverser of the bill of indictment, or of the plaintiff or defendant, that there are probable grounds to believe that a fair and impartial trial cannot be obtained in the county in which the action is pending, the judge may order a copy of the record of the action removed to some adjacent county for trial, if he is of the opinion that a fair trial cannot be had in said county, after hearing all the testimony offered on either side by affidavits: Provided, that when a case has been removed to another county for trial on motion of the solicitor, the defendant may, upon call of the case for trial, object to trial therein and move that the case be sent for trial to some other county adjacent to the county from which removed, and in the event the objection is overruled, the defendant may forthwith appeal to the appellate division. If the motion of the defendant is sustained the judge shall order the case tried in some other county adjacent to the county from which the case was first removed. If, upon appeal, the appellate division shall find error in the order denying the motion or if it shall suggest that the case probably ought to be removed then, and in such event, it shall be the duty of the judge at the next session of court of the county to which the case was first removed to order the case sent for trial to some other county adjacent to the county where the bill of indictment was found. The county from which the cause is removed must pay to the county in which the cause has been tried the full amount paid by the trial county for jurors' fees, and the full costs in the cause which are not taxable against or cannot be recovered from a party to the action, and for which the trial county is liable. (1806, c. 693, s. 12, P. R.; 1879, s. 45; Code, s. 196; 1899, cc. 104, 508; Rev., s. 426; 1917, c. 44; C. S., s. 471; 1957, c. 601; 1969, c. 44, s. 1.)

Editor's Note.—

The 1957 amendment inserted the proviso and the second and third sentences.

The 1969 amendment substituted "appellate division" for "Supreme Court" in the first and third sentences and substituted "session" for "term" in the third sentence.

Discretion, etc.—

A motion for change of venue or, in the alternative, that a jury be summonsed from another county, on the ground that defendant could not obtain a fair trial because of widespread and unfavorable publicity, is addressed to the discretion of the trial court, and where the record discloses that the trial judge conducted a hearing, read all the affidavits, and examined the press releases, that each juror selected stated that he could render a verdict uninfluenced by the publicity, and that defendant did not exhaust his peremptory challenges, abuse of discretion in denying the motion is not disclosed. State v. Porth, 269 N.C. 329, 153 S.E.2d 10 (1967).

A motion for change of venue or for a special venire may be granted or denied in the discretion of the trial judge, and his decision in the exercise of such discretion is not reviewable in the Court of Appeals unless gross abuse of discretion is shown. State v. Ledbetter, 4 N.C. App. 303, 167 S.E.2d 68 (1969).

A motion for change of venue or for a special venire from another county, upon the ground that the minds of the residents in the county in which the crime was committed had been influenced against the defendant, is addressed to the sound discretion of the trial court. State v. Ledbetter, 4 N.C. App. 303, 167 S.E.2d 68 (1969).

Order Tantamount to Denial of Motion to Remove.—When the judge entered an order directing that venire of jurors be drawn from another county to serve as jurors in the trial, it was tantamount to a denial of a motion to remove the cases to another county for trial. State v. Moore, 258 N.C. 300, 128 S.E.2d 563 (1962).

Waiver of Rights by Failure to Except or Appeal.—The defendant by failing to except to the judge's denial of the motion for removal and by failing to appeal waives all rights for removal. State v. Moore, 258 N.C. 300, 128 S.E.2d 563 (1962).

Applied in State v. Arnold, 258 N.C. 563, 129 S.E.2d 229 (1963); State v. Ray, 274 N.C. 556, 164 S.E.2d 457 (1968).

Cited in State v. Perry, 248 N.C. 334, 103 S.E.2d 404 (1958); State v. Perry, 250 N.C. 119, 108 S.E.2d 447 (1959).

§ 1-85. Affidavits on hearing for removal; when removal ordered.

Affidavit Must Set Forth Ground of Application. The rule with respect to removal upon the grounds that the defendant cannot get a fair trial in the county where the action is pending contemplates that affidavits for the removal must "set forth particularly in detail the ground of the application." State v. Moore, 258 N.C. 300, 128 S.E.2d 563 (1962).

§ 1-86: Repealed by Session Laws 1967, c. 218, s. 4.

Cross Reference.—

For present provisions as to supplemental jurors from other counties, see § 9-12.

§ 1-87. Transcript of removal; subsequent proceedings; depositions.—(a) When a cause is directed to be removed, the clerk shall transmit to the court to which it is removed a transcript of the record of the case, with the prosecution bond, bail bond, and the depositions, and all other written evidences filed therein; and all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties in writing duly filed, or by order of court.

(b) After a cause has been directed to be removed, and prior to the time that the transcript is deposited with the court to which the cause is removed, depositions may be taken in the cause, and subpoenas for the attendance of witnesses and commissions to take depositions may issue from either of the said courts, under the same rules as if the cause had been originally commenced in the court from which the subpoenas or commissions issued. (1806, c. 694, s. 12, P. R.; 1810, c. 787, P. R.; R. C., c. 31, s. 118; C. C. P., s. 69; Code, ss. 195, 198; Rev., s. 428; C. S., s. 474; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment designated the former provisions of the section as subsection (a) and added subsection (b).

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Provisions similar to those of present subsection (b) formerly appeared in § 8-62, now repealed.

Time to Deposit.—

Where the order of removal is by consent and no time is limited in the order of removal, the parties, or either of them, should have a reasonable time in which to deposit the transcript in the other court. Jones v. Brinson, 238 N.C. 506, 78 S.E.2d 334 (1953).

Jurisdiction during Interval Allowed for Perfecting Removal.—During the interval allowed for perfecting the order of removal, jurisdiction cannot exist simultaneously in both courts, unless, as permitted by this section, it is "otherwise provided by the consent of the parties in writing duly filed, or by order of court." And there is the further exception that, by virtue of § 8-62, subpoenas for witnesses and commissions to take depositions may issue from either court during the interval between the entry of the order of removal and the filing of the transcript in the court to which removal is ordered. Subject to these exceptions, when jurisdiction of the court to which the cause is removed attaches, the court of original venue eo instante loses jurisdiction. And it is a fair interpretation of this section that until the transcript is filed in the court to which removal is ordered, it does not acquire jurisdiction over the cause. Jones v. Brinson, 238 N.C. 506, 78 S.E.2d 334 (1953).

Effect of Failure to File Transcript within Time Allowed.—In the event the transcript of removal is not filed within the time limited by the court, or within a reasonable time after the order of removal is entered where no time for removal is fixed, the dormant jurisdiction of the court of original venue, on proper notice, may be reactivated for exclusive control over the cause. Jones v. Brinson, 238 N.C. 506, 78 S.E.2d 334 (1953); Farmers Cooperative Exch., Inc. v. Trull, 255 N.C. 202, 120 S.E.2d 438 (1961).

When neither party has taken steps to perfect the removal of the cause, either party has the right to move the lower court for a reactivation of its jurisdiction, and have it determine, on notice to the other party, whether the order of removal should be rescinded as upon abandonment of the right of removal. Jones v. Brinson, 238 N.C. 506, 78 S.E.2d 334 (1953).

Failure to Transmit Copy of Entire Record.—It is not absolutely essential to the acquirement of jurisdiction by the court to which the venue is changed that a copy of the entire record be transmitted. It would seem to be sufficient to bring its power of jurisdiction into exercise if enough is transmitted to enable the court to determine what is in controversy and what is to be adjudicated by it. Once this is done, defects may be cured, if need be, by certiorari, upon suggestion of a diminution of the record. Meanwhile, the jurisdiction of the court of original venue becomes dormant, and that court is functus officio to deal with the substantive rights of the parties during the interval allowable for the filing of the transcript in the court to which the case is ordered removed. Jones v. Brinson, 238 N.C. 506, 78 S.E.2d 334 (1953).

§ 1-87.1: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

Article 8.

Summons.

§ 1-88: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — For provisions of Rules of Civil Procedure as to commencement of action, see Rule 3 (§ 1A-1).

§ 1-88.1: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (a), Rule 4 of the Rules of Civil Procedure (§ 1A-1).

§ 1-89: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — For provisions of Rules of Civil Procedure as to process, see Rule 4 (§ 1A-1).

§§ 1-90, 1-91: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions of Rules of Civil Procedure as to process, see Rule 4 (§ 1A-1).

§ 1-93. Amount requisite for summons to run outside of county.—No summons in civil suits or civil proceedings shall run outside the county where issued, unless the amount involved in the litigation is more than two hundred dollars in matters arising out of contract and more than fifty dollars in matters arising in tort. Provided, that this section shall not affect or limit the provisions of §§ 7-138, 7-140 to 7-143, and provided further that this section shall not be applicable to suits for the collection of taxes and foreclosure of tax liens pursuant to the provisions of article 27 of chapter 105 of the General Statutes or other actions or proceedings of which the superior court has exclusive, original jurisdiction. (1939, c. 81; 1955, c. 39.)

Local Modification.—Franklin (recorder's court): 1953, c. 218, s. 3.

Editor's Note. — The 1955 amendment expressly excluded suits for the collection of taxes and the foreclosure of tax liens.

§ 1-94: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions of Rules of Civil Procedure as to process, see Rule 4 (§ 1A-1).

§ 1-95: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (d), Rule 4 of the Rules of Civil Procedure (§ 1A-1).

§ 1-96: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (e), Rule 4 of the Rules of Civil Procedure (§ 1A-1).

§ 1-97: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — For provisions of Rules of Civil Procedure as to service of process, see section (j), Rule 4 (§ 1A-1).

§ 1-98: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions of Rules of Civil Procedure as to service of process, see Rule 4 (§ 1A-1).

§ 1-98.1. Service of process by publication and service of process outside the State; when allowed.—Service of process by publication or service of process outside the State may be ordered in the kinds of actions and special proceedings set out in G. S. 1-98.2 with respect to persons described in G. S. 1-98.3 upon the filing of the sworn statement required by G. S. 1-98.4. (1953, c. 919, s. 1.)

Editor's Note. — Session Laws 1953, c. 919, s 1, effective July 1, 1953, struck out former §§ 1-98 and 1-99, and inserted in lieu thereof present §§ 1-98.1 to 1-98.4 and 1-99.1 to 1-99.4.

For comment on the 1953 act, see 31 N.C.L. Rev. 391 (1953).

§ 1-98.2. Actions and special proceedings in which service of process may be had by publication or by service of process outside the State.—Service of process by publication or service of process outside the State may be had in the following kinds of actions and special proceedings:

(1) Those in which the court has jurisdiction over the real or personal property which is the subject matter of the litigation;

(2) Those in which the court by order of attachment granted therein at any time prior to judgment secures control over property belonging to the person to be served;

(3) Those for annulment of marriage, divorce, adoption or custody of a minor child, or for any other relief involving the domestic status of the person to be served;

(4) Those for the purpose of revoking, cancelling, suspending or otherwise regulating licenses issued or privileges granted by the State or any political subdivision thereof, or by any agency of either, to the person to be served, and

(5) Any other actions and special proceedings in rem or quasi in rem in which the court has jurisdiction over the res.

(6) Where the defendant, a resident of this State, has departed therefrom or keeps himself concealed therein with intent to defraud his creditors or to avoid the service of summons. (1953, c. 919, s. 1; 1957, c. 553.)

Editor's Note.—The 1957 amendment added subdivision (6).

Constitutionality. — The great majority of cases have sustained the validity of a personal judgment recovered against a resident or a domestic corporation upon substituted or constructive service of process where he or it could not be personally served within the State, and the constitutionality of statutes authorizing such service has generally been sustained so far as residents are concerned. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Purpose of Section.—This section, providing for service by publication in certain actions, is designed to provide for a constructive service of process on nonresidents in certain instances in in rem or quasi in rem actions, and in actions in personam where the defendant, a resident of the State, has departed the State or conceals himself with intent to defraud his creditors or avoid service of process. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

The character of the service usually plays a determinative role in a decision whether the service will be sustained. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Sufficient Averment of Due Diligence.—An avermeent in the words of this section of the ultimate fact that, after due diligence, personal service cannot be had within the State, is a sufficient averment of due diligence and sufficient compliance with statutory requirements without stating any of the probative, or evidentiary facts. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Constructive Service upon Nonresident Ineffectual in Action in Personam.—In an action in personam constructive service by publication, or personal service outside the State upon a nonresident is ineffectual for any purpose. Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963)

A judgment in personam rendered in a state court against a nonresident upon constructive service cannot be enforced even in the state where it was rendered. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Action Solely Ex Contractu Is Not within Provisions of Subdivision (1).—An action for breach of contract to rebuild a church organ, the nonresident contractor claiming no interest in the organ nor any lien thereon, is an action solely ex contractu and does not come within the provisions of subdivision (1) of this section so as to authorize service of process on the nonresident contractor under § 1-104 (a). Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963).

Subdivision (3) Does Not Authorize Judgment for Child Support.—In a divorce action, service of process outside the State under subdivision (3) of this section does not give the court authority to enter judgment against the defendant for the support of the children. Fleek v. Fleek, 270 N.C. 736, 155 S.E.2d 290 (1967), commented on in 47 N.C.L. Rev. 437 (1969).

Application of Subdivision (6).—Subdivision (6) has no application to a nonresident of this State. Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963).

Subdivision (6) applies only where the defendant is a resident of this State and has departed therefrom or keeps himself concealed therein with intent to defraud his creditors or to avoid the service of process. Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963).

Subdivision (6) can have no application when it appears from the complaint that defendant is a nonresident or if it does not affirmatively appear that he is a resident who has left the State for the purpose of defrauding his creditors and avoiding service of summons. Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963).

A resident of the State who has departed with intent to defraud his creditors or to avoid service of process, or a resident who keeps himself concealed in the State with like intent, is amenable to service of process by publication under subdivision (6) of this section. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Proof under Subdivision (6).—Since no comma separates the two predicates in subdivision (6) of this section, the intent to defraud creditors or to avoid the service of summons must be shown both as to departure and as to concealment. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

What Complaint and Affidavit Must Show.—In order to be a valid service of process under § 1-104, it must appear by affidavit or by verified complaint treated as an affidavit, that the requirements of § 1-98.4 have been met and that the cause of action is within the purview of this section. Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

Description of Real Estate. — Where service by publication was obtained under provisions of an earlier statute, service was held to be questionable because publication merely notified defendants that action had commenced "concerning real estate, of which the superior court of the said county has jurisdiction." Menzel v. Menzel, 250 N.C. 649, 110 S.E.2d 333 (1959).

Applied in Surratt v. Surratt, 263 N.C. 466, 139 S.E.2d 720 (1965).

§ 1-98.3. Persons upon whom service of process may be had by publication or by service of process outside the State.—(a) Service of process by publication or service of process outside the State may be had upon any person, natural or corporate, known or unknown, when, after due diligence, personal service cannot be had within the State.

(b) The persons described in subsection (a) of this section shall include, but not be limited to,

(1) Natural persons, whether residents or nonresidents of this State, including infants and incompetents as described in subsections (2) and (3) of G. S. 1-97 when personal service is had upon the guardian or other person required to be served by such subsections, and persons whose existence or identity or residence remains unknown;

(2) Stockholders of corporations or of joint stock companies, even though their existence or identity or residence remains unknown, where the action against the stockholders of such corporations or joint stock companies is authorized by law;

(3) Joint stock associations or other unincorporated associations, even though their existence or identity or residence remains unknown;

(4) Any corporation or other legal entity, whether it is foreign, domestic, or its domicile is unknown, and whether it is dissolved or existing, including corporations or other legal entities not known to be dissolved or existing,

(5) Any business or operation which has done business or operated under a name which includes the word "corporation", "company", "incorporated", "inc." or any combination thereof, or under a name which indicates or tends to indicate, that the same may be a corporation or other legal entity (1953, c. 919, s. 1.)

Cross Reference.—As to resident defendant in proceeding to condemn school site, see § 115-85 and note.

Applied in Harris v. Upham, 244 N.C. 477, 94 S.E.2d 370 (1956).

§ 1-98.4. Affidavit for service of process by publication or service of process outside the State; amendment thereof; extension of time for pleading. — (a) To secure an order for service of process by publication or service of process outside the State, the applicant must file in the office of the clerk of the court where the action is brought a statement in his verified pleading or separate affidavit, sworn to by the applicant, his agent or attorney, stating:

(1) That he is a party, or the agent or attorney of a party, to the action or special proceeding; and

(2) The facts with sufficient particularity to show: That the action or special proceeding is one of those specified in G. S. 1-98.2, that a cause of action exists against the person to be served or that he is a proper party and that the action or special proceeding is of such a kind that the court will have jurisdiction upon service of process by publication or service of process outside the State, and

(3) That, after due diligence, personal service cannot be had within the State; and

(b) Where such service is to be had upon a natural person, the verified pleading or affidavit must state:

(1) The name and residence of such person, or if they are unknown, that diligent search and inquiry have been made to discover such name and residence, and that they are set forth as particularly as is known to the applicant;

(2) That such person is a minor or an incompetent, if such fact is known to the applicant.

(c) Where such service is to be had upon a corporation, the verified pleading or affidavit must state:

(1) The name, domicile, principal place of business of the corporation, whether it be foreign or dissolved, and if such facts are unknown, that diligent search and inquiry have been made to discover same and that they are set forth in the affidavit as particularly as is known to the applicant.

(2) Whether or not the corporation is qualified to do business in this State, unless shown to be a North Carolina corporation.

(d) Where such service is to be had upon a business or operation doing business or operating under a name which indicates or tends to indicate that the same may be a corporation or other legal entity, the verified pleading or affidavit must state:

(1) The name under which said business or operation has been conducted;

(2) That after diligent search and inquiry the applicant has been unable to ascertain whether or not the organization operating under said name is a corporation, either foreign or domestic;

(3) The names and places of residence, if known, of all persons known to own an interest in such organization, and whether or not other or unknown persons may own any interest in such organization, or that, after diligent search and inquiry, all persons owning an interest in such organization are unknown to the applicant.

(e) Where such service is to be had upon unknown persons, the verified pleading or affidavit must state:

(1) That the plaintiff believes there are persons who are or may be interested in the subject matter of the action or special proceeding whose names are unknown to the applicant; and

(2) Whether said unknown persons are or may be interested as heirs, devisees, grantees, assignees, lienors, grantors, trustees or otherwise, and the nature of such interest, if known to the applicant.

(f) When an affidavit provided for by this section is defective, the judge or clerk may allow the affidavit to be amended and may issue a new order for service of process thereon.

(g) Where an order for publication is sought upon an affidavit instead of a verified pleading, the clerk may, on application, by written order extend the time for filing the pleading to a day certain, for a period not to exceed twenty (20) days from the filing of the affidavit. (1953, c. 919, s. 1.)

Affidavit Must Allege That Person Served Cannot Be Found within State.—An affidavit on which publications is predicated is fatally defective in the absence of an allegation that the person on whom the summons is so served cannot, after due diligence, be found within the State. Nash County v. Allen, 241 N.C. 543, 85 S.E.2d 921 (1955).

Requirements of Statute Must Be Strictly Followed.—Where service of summons is made by publication, the requirements of the statute must be strictly followed, and everything necessary to dispense with personal service of summons must appear by affidavit. Nash County v. Allen, 241 N.C. 543, 85 S.E.2d 921 (1955).

A prerequisite prescribed by statute to support an order of service by publication is jurisdictional. The omission from the pleadings or affidavit of any of the required information or averments, on which the order for substitute service is predicated, is fatal. Jones v. Jones, 243 N.C. 557, 91 S.E.2d 562 (1956).

Compliance with this statute is mandatory. The affidavit or sworn statement "That, after due diligence, personal service cannot be had within the State," is jurisdictional. Without it, service outside the State is ineffectual to bring the defendant into court. Temple v. Temple, 246 N.C. 334, 98 S.E.2d 314 (1957).

The affidavit in compliance with this section is jurisdictional. Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

The affidavit required to support an order for service of summons by publication is jurisdictional. The omission therefrom of any of the essential averments on which an order for substitute service is predicated is fatal. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Affidavit Must Show Compliance with This Section and That Case Comes within § 1-98.2.—In order to be a valid service of process under § 1-104, it must appear by affidavit or by verified complaint treated as an affidavit, that the requirements of this section have been met and that the cause of action is within the purview of § 1-98.2. Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

To sustain service upon defendant by

publication, plaintiff must show: (1) That the case is one in which service by publication is authorized by statute; and (2) that the questioned service has been made in accordance with statutory requirements. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

To secure an order for service by publication, in his affidavit the applicant must state, inter alia, in addition to averring facts which show the action to be one of those specified in § 1-98.2, the name and residence of the person to be served; or, if they are unknown, that diligent search and inquiry have been made to discover such name and residence; and that they are set forth as particularly as is known to the applicant. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Amicus Curiae Is Not Competent to Make Affidavit. — An amicus curiae may not assume the place of a party in a legal action and is not a competent person under this section to make the jurisdictional affidavit for service by publication. Shaver v. Shaver, 248 N.C. 113, 102 S.E.2d 791 (1958).

If no address is known, or has never been known, the applicant should so state. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

The failure to find defendant at his last known address does not eliminate the requirement that the applicant for an order allowing service by publication should set out the residence of defendant "as particularly as is known to the applicant." Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

It is sufficient if the affidavit states the ultimate fact of due diligence substantially in the language of the statute Brown v. Doby, 242 N.C. 462, 87 S.E.2d 921 (1955).

An averment in the words of the statute of the ultimate fact, "that, after due diligence, personal service cannot be had within the State," was a sufficient compliance with statutory requirements without stating any of the probative, or evidentiary, facts. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Void Service of Process. — Where neither the pleadings nor affidavit state the residences of respondents to be served with process by publication, nor that their addresses were unknown, nor that they were minors, when this fact is known to petitioner, service of process based thereon is void. Jones v. Jones, 243 N.C. 557, 91 S.E.2d 562 (1956).

Where applicant failed to meet the requirements of subsection (b) (1) and (2), and the record failed to show that the clerk of the superior court had mailed the copy of notice as required by § 1-99.2 (c), the Supreme Court held the purported service of process by publication to be fatally defective and the judgment entered on it void. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Evidence held insufficient to establish that defendant kept himself concealed in the State in order to avoid service of process. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Quoted in Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963).

§ 1-99: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-99.1. Form of order for service of process by publication or service of process outside the State. — An order for service of process by publication or service of process outside the State in substantially the following form is sufficient:

STATE OF NORTH CAROLINA

IN THE SUPERIOR COURT

.... COUNTY

(Title of action
or special proceeding)

ORDER FOR SERVICE OF PROCESS
(Strike out one of the following)

BY PUBLICATION
OUTSIDE THE STATE

(An affidavit)
(A verified pleading)

satisfying the requirements of G. S. 1-98.4

having been duly filed herein and it appearing to the satisfaction of the undersigned that .... (Party to be served) cannot, after due diligence, be found in the State, it is now, therefore, ORDERED

That service of process in the above-entitled (action) (special proceeding) upon .... (Party to be served) be made (Strike out one of the following)

By publication in .... (Newspaper) once a week for four successive weeks of the notice issued by the undersigned as provided by G. S. 1-99.2.

By service of process outside the State as provided by G. S. 1-104.

.... (Judge) (Clerk)
Superior Court

(1953, c. 919, s. 1.)

Applied in Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966).

§ 1-99.2. Notice of service of process by publication. — (a) The judge or clerk who signs the order for service of process by publication provided for in G. S. 1-99.1 shall issue a notice of service of process by publication which shall

(1) Designate the court in which the action or special proceeding has been commenced and the title of the action or special proceeding;

(2) Be directed to the person to be thus served;

(3) State either that a pleading seeking relief against the person to be served has been filed in the action or special proceeding, or has been required to be filed therein not later than a date named in the notice;

(4) State the nature of the relief being sought;

(5) Require the person to be served to make defense to such pleading not later than a designated date, and notify him that upon his failure to do so the party seeking service will apply to the court for the relief sought.

(b) The date to be designated pursuant to paragraph (5) of subsection (a) of this section shall be the date when, after completion of service of process by publication, as provided by G. S. 1-100, the time for answering expires as provided by G. S. 1-125.

(c) The clerk shall mail a copy of the notice of service of process by publication to each party whose name and residence or place of business appear in the verified pleading or affidavit pursuant to the provisions of G. S. 1-98.4. Such copies shall be sent via ordinary mail, addressed to each party at the address of such party's residence or place of business as set forth in the verified complaint or affidavit, and shall be posted in the mails not later than five (5) days after the issuance of the order for service of process by publication. By certificate at the bottom of the order for service of process by publication or by separate certificate filed with the order, the clerk shall certify that a copy of the notice of service of process by publication has been duly mailed to each party whose name and residence or place of business appear in the verified pleading or affidavit, giving the date of posting thereof in the mails, and the clerk shall make an appropriate record thereof in accordance with the provisions of G. S. 2-42.

Failure on the part of any party to receive a copy of the notice mailed in accordance with the provisions hereof shall not affect the validity of the service of process upon such party by publication, and no such copy of the notice need be mailed to any party as to whom the verified pleading or affidavit states that such party's residence or place of business is unknown and that diligent search and inquiry have been made to discover same. (1953, c. 919, s. 1.)

The clerk of court is not physically and personally required to mail the notice. It goes without saying that when he, or one in his office, authorizes the mailing of a notice, and there is proof by the person to whom the mailing is entrusted that it was mailed, that this constitutes compliance with the statute. York v. York, 271 N.C. 416, 156 S.E.2d 673 (1967).

The mailing of a letter properly addressed presumes a delivery to the addressee. York v. York, 271 N.C. 416, 156 S.E.2d 673 (1967).

Findings of Clerk Conclusive. — Findings of the clerk of the superior court, based on testimony before him, that he had signed an order for publication and had made a certificate, that he had addressed and mailed the notice of publication, and placed the certificate in the file, are conclusive even though the original record failed to so show, and are sufficient to support the clerk's denial of a motion to set aside the judgment in the proceeding for want of proper service. York v. York, 271 N.C. 416, 156 S.E.2d 673 (1967).

When Notice of Service Not Required.— This section does not require the clerk to mail defendant a copy of notice of service of process by publication when plaintiff's affidavit stated defendant's residence was unknown and diligent search and inquiry had been made to discover it. Stokes v. Stokes, 260 N.C. 203, 132 S.E.2d 315 (1963).

Failure of Clerk to Mail Notice. — In Harmon v. Harmon, 245 N.C. 83, 95 S.E.2d 355 (1956), a judgment was vacated for failure of the clerk of the superior court to mail the notice. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Where applicant failed to meet the requirements of § 1-98.4 (b) (1) and (2), and the record failed to show that the clerk of the superior court had mailed the copy of notice as required by subsection (c) of this section, the Supreme Court held the purported service of process by publication to be fatally defective and the judgment entered on it void. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Failure of party to receive copy of notice mailed as required by this section does not invalidate the service of process by publication. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Applied in Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 21 (1966).

Cited in Jones v. Jones, 243 N.C. 557, 91 S.E.2d 562 (1956); Harmon v. Harmon, 245 N.C. 83, 95 S.E.2d 355 (1956); Shaver v. Shaver, 248 N.C. 113, 102 S.E.2d 791 (1958).

§ 1-99.3. Form of notice of service of process by publication.—A notice of service of process by publication in substantially the following form, is sufficient:

NOTICE OF SERVICE OF PROCESS
BY PUBLICATION
STATE OF NORTH CAROLINA
.... COUNTY
IN THE SUPERIOR COURT

(Title of action
or special
proceeding)

To .... (Person to be served)

Take notice that

A pleading seeking relief against you (has been filed) (is required to be filed not later than .... 19..) in the above entitled (action) (special proceeding)

The nature of the relief being sought is as follows:

(State nature)

You are required to make defense to such pleading not later than ...., 19 . and upon your failure to do so the party seeking service against you will apply to the court for the relief sought.

This the ...... day of .... 19..

.... (Judge) (Clerk)
Superior Court

(1953, c. 919, s. 1.)

Quoted in Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

§ 1-99.4. Cost of publication of notice in lieu of personal service.—The cost of publishing a notice as provided by G. S. 1-98 through G. S. 1-99.3 shall be governed by the provisions of G. S. 1-596 relating to legal advertising. (1953, c. 919, s. 1.)

§§ 1-100 to 1-105: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-105.1: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Editor's Note.—The repealed section derived from Session Laws 1955, c. 232.

§§ 1-106 to 1-107.1: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-107.2: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Editor's Note.—The repealed section derived from Session Laws 1961, c. 661, as amended by c. 1202, Session Laws 1961, and related to service upon nonresident operators of watercraft or their personal representatives.

§ 1-107.3: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Editor's Note.—The repealed section derived from Session Laws 1963, c. 1088, and related to service upon nonresident operators of aircraft or their personal representatives.

§ 1-108. Defense after judgment set aside.—If a judgment is set aside pursuant to Rule 60 (b) or (c) of the Rules of Civil Procedure and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. Title to property sold under such judgment to a purchaser in good faith is not thereby affected. No fiduciary officer or trustee who has made distribution of a fund under such judgment in good faith is personally liable if the judgment is changed by reason of such defense made after its rendition; nor in case the judgment was rendered for the partition of land, and any persons receiving any of the land in such partition sell it to a third person; the title of such third person is not affected if such defense is successful, but the redress of the person so defending after judgment shall be had by proper judgment against the parties to the original judgment and their heirs and personal representatives, and in no case affects persons who in good faith have dealt with such parties or their heirs or personal representatives on the basis of such judgment being permanent. (C. C. P., s. 85; Code, s. 220; Rev., s. 449; 1917, c. 68; C. S., s. 492; 1943, cc. 228, 543; 1947, c. 817, s. 2; 1949, c. 256; 1967, c. 954, s. 3.)

Editor's Note.—

The 1967 amendment rewrote the first sentence.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

ARTICLE 9.

Prosecution Bonds.

§ 1-109. Plaintiff's, for costs.—At any time after the issuance of summons, the clerk or judge, upon motion of the defendant, shall require the plaintiff to do one of the following things and the failure to comply with such order within thirty days from the date thereof shall constitute grounds for dismissal of such civil action or special proceeding:

(1) Give an undertaking with sufficient surety in the sum of two hundred dollars, with the condition that it will be void if the plaintiff pays the defendant all costs which the latter recovers of him in the action.

(2) Deposit two hundred dollars with him as security to the defendant for these costs, in which event the clerk must give to the plaintiff and defendant a certificate to that effect.

(3) File with him a written authority from a judge or clerk of a superior court, authorizing the plaintiff to sue as a pauper: Provided, however, that the requirements of this section shall not apply to the State of North Carolina or any of its agencies, commissions or institutions, or to counties, drainage districts, cities and towns; provided, further, that the State of North Carolina or any of its agencies, commissions or institutions, and counties, drainage districts, cities and towns may institute civil actions and special proceedings without being required to give a prosecution bond or make deposit in lieu of bond. (R. C., c. 31, s. 40; C. C. P., s. 71; Code, s. 209, Rev., s. 450; C. S., s. 493; 1935, c. 398; 1949, c. 53; 1955, c. 10, s. 1; 1957, c. 563; 1961, c. 989.)

Local Modification.—Mecklenburg: 1955, c. 877; Union: 1961, c. 506.

Editor's Note.—The 1955 amendment inserted in subsection (3) the references to "the State of North Carolina or any of its agencies, commissions or institutions." Section 2 of the amendatory act made it applicable to pending litigation, and provided that all actions or proceedings heretofore instituted by the State or its agencies shall be valid as if its provisions had at all times been the law of the land.

The 1957 amendment inserted "drainage districts" after "counties" in lines five and seven of subsection (3).

The 1961 amendment rewrote the part of this section preceding subdivision 1.

§ 1-111. Defendant's for costs and damages in actions for land.

Purpose of Section.—

The plain purpose of this section is to assure the plaintiff that he will suffer no damages during such period as he may be wrongfully deprived of possession. Morris v. Wilkins, 241 N.C. 507, 85 S.E.2d 892 (1955).

The word "defendant" was not intended to comprehend the State or its agencies. Kistler v. City of Raleigh, 261 N.C. 775, 136 S.E.2d 78 (1964).

A municipality is not required to file bond in defending an action for the possession of real property, since this section does not apply to the State or its agencies. Kistler v. City of Raleigh, 261 N.C. 775, 136 S.E.2d 78 (1964).

Failure to Give Undertaking—When No Objection Made.—

See Rich v. Norfolk S. Ry., 244 N.C. 175, 92 S.E.2d 768 (1956).

In accord with original. See Gates v. McDonald, 1 N.C. App. 587, 162 S.E.2d 143 (1968).

Same—Waiver.—

In accord with 2nd paragraph in original. See Sisk v. Perkins, 264 N.C. 43, 140 S.E.2d 753 (1965); Gates v. McDonald, 1 N.C. App. 587, 162 S.E.2d 143 (1968).

The provisions of this section and § 1-112 are subject to be waived unless seasonably insisted upon by the plaintiff. Motley v. Thompson, 259 N.C. 612, 131 S.E.2d 447 (1963).

The statutory requirement of bond in actions in ejectment may be waived, and therefore in plaintiffs' action in trespass in which defendants file a counterclaim in ejectment, judgment by default in favor of defendants on the counterclaim for want of a bond is properly set aside when plaintiffs file a reply to the counterclaim and raise no objection based on want of bond until some weeks thereafter when, without notice to plaintiffs, they move for default judgment before the clerk. Motley v. Thompson, 259 N.C. 612, 131 S.E.2d 447 (1963).

Although the filing of a bond by defendant before he is allowed to plead in an action for the recovery or possession of real property appears to be a mandatory requirement, the Supreme Court has held that the requirement may be waived and has treated this section with considerable leniency. Gates v. McDonald, 1 N.C. App. 587, 162 S.E.2d 143 (1968).

The undertaking required by this section is for the benefit of the plaintiff, and it ought to be strictly required unless waived by him; but he may waive it if he sees fit to do so. Gates v. McDonald, 1 N.C. App. 587, 162 S.E.2d 143 (1968).

Sufficiency of Bond Is "Matter Included in the Action".—See note under § 1-294.

The bond required by this section does not apply to a defendant who is not in possession of the land in controversy. Hence, this section does not apply to an action by a plaintiff in possession to remove a cloud from his title. Nor does it apply to an action to establish a parol trust and to have defendant render an accounting as mortagee in possession. Nor does it apply to a special proceeding under G. S. § 38-1 et seq. to establish the location of a boundary line. The decisions point towards a restriction of its application to actions in ejectment, the defendant being in possession when the action is commenced. Morris v. Wilkins, 241 N.C. 507, 85 S.E.2d 892 (1955).

This section and § 1-112 do not apply unless the party against whom relief is demanded is in possession of the property, and therefore when motion to strike a cross action on ground of want of bond is denied, it will be assumed, in the absence of findings of record, that the court found, in accordance with allegations in the pleadings, that the parties against whom the relief was demanded were not in possession. Motley v. Thompson, 259 N.C. 612, 131 S.E.2d 447 (1963).

Bond Not Required in Absence of Allegation That Defendant Is in Actual Possession.—In an action for damages for trespass upon realty in which there is no allegation to the effect that the defendant is in actual possession of the property or any part thereof, the defendant is not required to post bond before answering, as required by this section and § 1-211, subsection 4. Wilson v. Chandler, 238 N.C. 401, 78 S.E.2d 155 (1953).

§ 1-112. Defense without bond.

Cited in Morris v. Wilkins, 241 N.C. 507, 85 S.E.2d 892 (1955); Sisk v. Perkins, 264 N.C. 43, 140 S.E.2d 753 (1965); Gates v. McDonald, 1 N.C. App. 587, 162 S.E.2d 143 (1968).

ARTICLE 10.

Joint and Several Debtors.

§ 1-113. Defendants jointly or severally liable.

At common law in actions ex contractu, the general rule is, if the contract be joint, the plaintiff must sue all the persons who either expressly or by implication of law made the contract. North State Fin. Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

Subdivision 1 applies to obligations that are joint only, not to obligations that are joint and several. North State Fin. Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

Partners—In General.—

While a creditor and also each partner has a right to demand that partnership (joint) property be applied to the satisfaction of partnership debts, each partner is severally bound to the creditor for the full amount of his claim. North State Fin. Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

§ 1-114. Summoned after judgment; defense.

This section applies to obligations that are joint only, not to obligations that are joint and several. North State Fin. Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

§ 1-115: Repealed by Session Laws 1969, c. 954, s. 4, effective January 1, 1970.

ARTICLE 11.

Lis Pendens.

§ 1-116. Filing of notice of suit.—(a) Any person desiring the benefit of constructive notice of pending litigation must file a separate, independent notice thereof, which notice shall be cross-indexed in accordance with G.S. 1-117, in the following cases:

(1) Actions affecting title to real property;

(2) Actions to foreclose any mortgage or deed of trust or to enforce any lien on real property; and

(3) Actions in which any order of attachment is issued and real property is attached.

(b) Notice of pending litigation shall contain:

(1) The name of the court in which the section has been commenced or is pending;

(2) The names of the parties to the action;

(3) The nature and purpose of the action; and

(4) A description of the property to be affected thereby.

(c) Notice of pending litigation may be filed:

(1) At or any time after the commencement of an action pursuant to Rule 3 of the Rules of Civil Procedure; or

(2) At or any time after real property has been attached; or

(3) At or any time after the filing of an answer or other pleading in which the pleading party states an affirmative claim for relief falling within the provisions of subsection (a) of this section.

(d) Notice of pending litigation must be filed with the clerk of the superior court of each county in which any part of the real estate is located, not excepting the county in which the action is pending, in order to be effective against bona fide purchasers or lien creditors with respect to the real property located in such county. (C. C. P., s. 90; Code, s. 229; Rev., s. 460; 1917, c. 106; C. S., s. 500; 1949, c. 260; 1959, c. 1163, s. 1; 1967, c. 954, s. 3.)

Editor's Note.—

The 1959 amendment rewrote this section.

The 1967 amendment deleted former subdivisions (1) and (2) of subsection (c), added present subdivision (1), redesignated former subdivisions (3) and (4) as present subdivisions (2) and (3), and in subdivision (3) substituted "states an affirmative claim for relief," for "alleges an affirmative cause of action."

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

A Harsh Rule.—

In accord with original. See Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Strict Compliance.—The statutory law as to lis pendens embodied in this article provides a definite method for giving constructive notice, so that a search of known records will convert it into actual notice. Since the application of this rule may work hardship in many instances, a strict compliance with its provisions is required. Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

The filing of lis pendens is authorized only in actions affecting the title to real property. Parker v. White, 235 N.C. 680, 71 S.E.2d 122 (1952).

Under this section, a notice of lis pendens can be filed against real property only in an action affecting its title. McGurk v. Moore, 234 N.C. 248, 67 S.E.2d 53 (1951).

Or to Do One of Things Enumerated.— Notice of lis pendens may not properly be filed except in an action, a purpose of which is to affect directly the title to the land in question or to do one of the other things mentioned in this section. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

There can be no valid notice of lis pendens in this State except in one of the three types of actions enumerated in subsection (a) of this section. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

It Is Required When Claim Is in Derogation of Record. — The rule lis pendens applies in actions to set aside deeds or other instruments for fraud, to establish a constructive or resulting trust, to require specific performance, to correct a deed for mutual mistake and in like cases where there is no record notice and where otherwise a prospective purchaser would be ignorant of the claim. That is, lis pendens notice is required when the claim is contra or in derogation of the record. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

The section is designed, etc.—

The effect of lis pendens and the effect of registration are in their nature the same thing. They are only different examples of instances of the operation of the rule of constructive notice. One is simply a record in one place and the other is a record in another place. Each serves its purpose in proper instances. They are each record notices. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Statutes Construed in Pari Materia.—The law of lis pendens and the statute requiring the registration of instruments affecting title to real property must be construed in pari materia. Otherwise, the one would be destructive of the other. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Modifies Common-Law Rule.—

The common-law rule of lis pendens has been replaced in North Carolina by the provisions of this article. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965); Pegram v. Tomrich Corp., 4 N.C. App. 413, 166 S.E.2d 849 (1969).

The nature of plaintiff's action must be determined by reference to the facts alleged in the body of the complaint rather than by what is contained in the prayer for relief. Pegram v. Tomrich Corp., 4 N.C. App. 413, 166 S.E.2d 849 (1969).

The purchaser of land is charged with notice of every description, recital, reference and reservation in deeds or muniments in his grantors' chain of title, and if the facts disclosed in such chain of title are sufficient to put the purchaser on inquiry, he will be charged with notice of what a proper inquiry would have disclosed. Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

A party having notice must exercise ordinary care to ascertain the facts, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired had he made effort to learn the truth of the matters affecting his interest. However, the rigor of the lis pendens rule has been softened by the equitable requirement that the means of information should be accessible to those who are careful enough to search for it. It logically follows that this equitable requirement would apply with equal force when a party is charged with notice by means other than lis pendens. Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

Res Must Be Sufficiently Described.—Concomitant to the rule that the lis pendens notification is confined to the apparent effect of the pleadings, they must contain a description of the property affected. The res must be sufficiently described in the pleadings. Hence the lis pendens notification will be confined to the property specified in the papers, and where a partial interest only in the property is asserted to be in issue the lis pendens notification does not extend to the entire interest. Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

An action to establish a trust as to certain described real property is an action "affecting title to real property" within the meaning of subsection (a) (1), and a valid notice of lis pendens may be filed in connection therewith. Pegram v. Tomrich Corp., 4 N.C. App. 413, 166 S.E.2d 849 (1969).

Action for Monetary Damages Not Included.—Where it is clear from a reading of the complaint and the amendment thereto that the action is one to recover monetary damages, the action is not one affecting the title to real property within the purview of this section. Parker v. White, 235 N.C. 680, 71 S.E.2d 122 (1952).

This section does not apply to an action the purpose of which is to secure a personal judgment for the payment of money even though such a judgment, if obtained and properly docketed, is a lien upon land of the defendant described in the complaint. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965); Booker v. Porth, 1 N.C. App. 434, 161 S.E.2d 767 (1968).

An action to secure a personal judgment for payment of money is not an action "affecting title to real property" within the meaning of subsection (a) (1), even though such a judgment, if obtained and properly docketed, is a lien upon land of the defendant. Pegram v. Tomrich Corp., 4 N.C. App. 413, 166 S.E.2d 849 (1969).

Nor Action to Prevent Change in Record.—An action brought for the purpose of preventing a change in the record and not for the purpose of establishing a trust or lien upon the property, is not an action of a type in which this section permits the filing of a notice of lis pendens. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Section Held Inapplicable.—See McLeod v. McLeod, 266 N.C. 144, 146 S.E.2d 65 (1966).

Cited in G. L. Wilson Bldg. Co. v. Leatherwood, 268 F. Supp. 609 (W.D.N.C. 1967); Hughes v. North Carolina State Highway Comm'n, 2 N.C. App. 1, 162 S.E.2d 661 (1968).

§ 1-116.1. Service of notice. — In all actions as defined in § 1-116 in which notice of pendency of the action is filed, a copy of such notice shall be served on the other party or parties as follows:

(1) If filed by the plaintiff at or after service of summons but before the filing of the complaint, service shall be in the manner provided in Rule 4 of the Rules of Civil Procedure for service of summons.

(2) If filed by the plaintiff at or after the filing of the complaint, service shall be in the same manner as the complaint.

(3) All other such notices shall be served in the manner provided in Rule 5 of the Rules of Civil Procedure. (1949, c. 260; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment rewrote this section. Provisions similar to those of the former last four sentences of the section now appear in subsection (b) of § 1-119.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

§ 1-117. Cross-index of lis pendens.—Every notice of pending litigation filed under this article shall be cross-indexed by the clerk of the superior court in a record, called the "Record of Lis Pendens," to be kept by him pursuant to G. S. 2-42(6). (1903, c. 472; Rev., s. 464; 1919, c. 31, C. S., s. 501; 1959, c. 1163, s. 2.)

Editor's Note. — The 1959 amendment rewrote this section.

§ 1-118. Effect on subsequent purchasers.

Applied in Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

§ 1-119. Notice void unless action prosecuted.—(a) The notice of lis pendens is of no avail unless it is followed by the first publication of notice of the summons or by an affidavit therefor pursuant to Rule 4 (j) (1) c of the Rules of Civil Procedure or by personal service on the defendant within 60 days after the cross-indexing.

(b) When an action is commenced by the issuance of summons and permission is granted to file the complaint within 20 days, pursuant to Rule 3 of the Rules of Civil Procedure, if the complaint is not filed within the time fixed by the order of the clerk, the notice of lis pendens shall become inoperative and of no effect. The clerk may on his own motion and shall on the ex parte application of any interested party cancel such notice of lis pendens by appropriate entry on the records, which entry shall recite the failure of the plaintiff to file his complaint within the time allowed. Such applications for cancellation, when made in a county other than that in which the action was instituted, shall include a certificate over the hand and seal of the clerk of the county in which the action was instituted that the plaintiff did not file his complaint within the time allowed. The fees of the clerk may be recovered against the plaintiff and his surety. (C. C. P., s. 90; Code, s. 229; Rev., s. 461; 1919, c. 31; C. S., s. 503; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment rewrote this section.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

§ 1-120. Cancellation of notice.

Section Applies to Cancellation of Valid Notice. — The provisions of this section with reference to cancellation of a notice of lis pendens are applicable to the cancellation of a valid notice. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

If a notice of lis pendens filed in the office of the clerk is not authorized by statute, a court has jurisdiction to cancel it, upon the motion of the owner of the record title to the land, without waiting for the termination of the action. Cutter v.

Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Cited in Parker v. White, 235 N.C. 680, 71 S.E.2d 122 (1952).

SUBCHAPTER VI. PLEADINGS.

ARTICLE 12.

Complaint.

§ **1-121**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For present provisions as to commencement of action by issuance of summons on application for permission to delay filing of complaint, see Rule 3 of the Rules of Civil Procedure (§ 1A-1).

§ **1-122**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-123**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For present provisions as to joinder of claims and remedies, see Rule 18 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 13.

Defendant's Pleadings.

§ **1-124**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For present provisions as to pleadings allowed, see Rule 7 of the Rules of Civil Procedure (§ 1A-1).

§ **1-125**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For present provisions as to when and how defenses and objections presented, see Rule 12 of the Rules of Civil Procedure (§ 1A-1).

§ **1-126**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For present provisions as to striking from pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent or scandalous matter, see section (f), Rule 12 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 14

Demurrer.

§ **1-127**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References.—For provision abolishing demurrers, pleas, etc., see Rule 7 of the Rules of Civil Procedure (§ 1A-1). As to manner of raising defenses and objections, see Rule 12 of the Rules of Civil Procedure (§ 1A-1). As to procedure upon misjoinder, see Rule 21 of the Rules of Civil Procedure (§ 1A-1). As to waiver of defenses and objections, see Rule 12 of the Rules of Civil Procedure (§ 1A-1).

§§ **1-128 to 1-131**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-132**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For present provisions as to procedure upon misjoinder, see Rule 21 of the Rules of Civil Procedure (§ 1A-1).

§§ **1-133, 1-134**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

ARTICLE 15.

Answer.

§ **1-134.1**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References.—For provisions similar to the last proviso in the repealed section, see subsection (b) of § 1-277. As to manner of presenting defense of lack of jurisdiction, see Rule 12 of the Rules of Civil Procedure (§ 1A-1). As to counterclaim and cross claim, see Rule 13 of the Rules of Civil Procedure (§ 1A-1).

§ **1-135**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For present provisions as to contents of pleadings, see Rule 8 of the Rules of Civil Procedure (§ 1A-1).

§ **1-136**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-137**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to counterclaim and cross claim, see Rule 13 of the Rules of Civil Procedure (§ 1A-1).

§ **1-138**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (e), Rule 12 of the Rules of Civil Procedure (§ 1A-1).

§ **1-139. Burden of proof of contributory negligence.**—A party asserting the defense of contributory negligence has the burden of proof of such defense. (1887, c. 33; Rev., s. 483; C. S., s. 523; 1967, c. 954, s. 3.)

Cross Reference.—As to pleading contributory negligence, see Rule 8 of the Rules of Civil Procedure (§ 1A-1).

Editor's Note. — The 1967 amendment rewrote this section.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Negligence is not presumed from the mere fact that one is killed. Goodson v. Williams, 237 N.C. 291, 74 S.E.2d 762 (1953)

Minor between ages of seven and fourteen is presumed to be incapable of contributory negligence. Weeks v. Barnard, 265 N.C. 339, 143 S.E.2d 809 (1965).

But Such Presumption May Be Overcome.—Presumption that a minor between the ages of seven and fourteen is incapable of contributory negligence may be overcome by evidence that the child did not use the care which a child of its age, capacity, discretion, knowledge, and experience would ordinarily have exercised under the same or similar circumstances. Weeks v. Barnard, 265 N.C. 339, 143 S.E.2d 809 (1965).

If a child fails to exercise care and prudence equal to his capacity, and the failure is one of the proximate causes of the injuries in suit, a child cannot recover. Weeks v. Barnard, 265 N.C. 339, 143 S.E.2d 809 (1965).

ARTICLE 16

Reply.

§ **1-140:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References. — As to pleadings allowed, see Rule 7 of the Rules of Civil Procedure (§ 1A-1). As to service of pleadings, see Rule 5 of the Rules of Civil Procedure (§ 1A-1).

§ **1-141:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to pleadings allowed, see Rule 7 of the Rules of Civil Procedure (§ 1A-1).

§ **1-142:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to pleadings allowed, see Rule 7 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 17.

Pleadings, General Provisions.

§ **1-143:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-144:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to signing and verification of pleadings, see Rule 11 of the Rules of Civil Procedure (§ 1A-1).

§ **1-145:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (b), Rule 11 of the Rules of Civil Procedure (§ 1A-1).

§ **1-146:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (c), Rule 11 of the Rules of Civil Procedure (§ 1A-1).

§ **1-147:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (d), Rule 11 of the Rules of Civil Procedure (§ 1A-1).

§ **1-148. Verification before what officer.**

Cross Reference.—As to attorney probating papers to be used in proceedings in which he appears as attorney, see § 47-8.

§ **1-150:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to pleading special matters, see Rule 9 of the Rules of Civil Procedure (§ 1A-1).

§ **1-151**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (f), Rule 8 of the Rules of Civil Procedure (§ 1A-1).

§ **1-152**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to enlargement of time, see Rule 6 of the Rules of Civil Procedure (§ 1A-1).

§ **1-153**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References. — For present provisions as to striking redundant, irrelevant, etc., matter, see section (f), Rule 12 of the Rules of Civil Procedure (§ 1A-1). As to motion for more definite statement, see section (e), Rule 12 of the Rules of Civil Procedure (§ 1A-1).

§§ **1-154 to 1-156**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to pleading special matters, see Rule 9 of the Rules of Civil Procedure (§ 1A-1).

§ **1-157**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (h), Rule 9 of the Rules of Civil Procedure (§ 1A-1).

§ **1-158**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (i), Rule 9 of the Rules of Civil Procedure (§ 1A-1).

§ **1-159**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For present provisions as to effect of failure to deny, see section (d), Rule 8 of the Rules of Civil Procedure (§ 1A-1).

§ **1-160**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

ARTICLE 18

Amendments.

§ **1-161**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to amendments, see Rule 15 of the Rules of Civil Procedure (§ 1A-1).

§ **1-162**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-163**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to amendments, see Rule 15 of the Rules of Civil Procedure (§ 1A-1).

§ **1-165**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-166. Defendant sued in fictitious name; amendment.

Purpose.—The obvious purpose of this section is to provide a plaintiff a means to toll the statute of limitations when he does not yet know the proper designation of the defendant. No comparable necessity existed when a defendant desired to pursue a cross action for contribution against an unknown joint tort-feasor under former § 1-240, since the statute did not begin to run on the claim for contribution until judgment had been recovered against the first tort-feasor. Wall Funeral Home v. Stafford, 3 N.C. App. 578, 165 S.E.2d 532 (1969).

What Section Provides. — This section provides that when the plaintiff is ignorant of the name of a defendant, he may designate such defendant by any name and later amend his pleadings to insert the true name when it is discovered. Wall Funeral Home v. Stafford, 3 N.C. App. 578, 165 S.E.2d 532 (1969).

Defendant May Not Cross Plead against Unknown Additional Defendant.—This section does not, at least by express language, apply to authorize a defendant to cross plead against an unknown additional defendant, and former § 1-240 contained no provision permitting a cross action for contribution against an additional defendant designated only by a fictitious name. Wall Funeral Home v. Stafford, 3 N.C. App. 578, 165 S.E.2d 532 (1969).

§ **1-167**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to supplemental pleadings, see Rule 15 of the Rules of Civil Procedure (§ 1A-1).

§ **1-168**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to amendments to conform pleadings to evidence, see Rule 15 of the Rules of Civil Procedure (§ 1A-1).

§ **1-169**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

SUBCHAPTER VII. PRETRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

ARTICLE 18A.

Pretrial Hearings.

§ **1-169.1**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to pretrial procedure, see Rule 16 of the Rules of Civil Procedure (§ 1A-1).

§§ **1-169.2 to 1-169.6**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to pretrial procedure, see Rule 16 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 19

Trial.

§§ **1-170 to 1-173**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-174. Issues of fact before the clerk

Preliminary questions of fact are to be decided by the clerk under this section. If he finds against the petitioner upon them, he dismisses the proceeding, and, if so advised, the petitioner excepts and appeals to the judge, who hears and decides the appeal. Kaperonis v. North Carolina State Highway Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963).

Quoted in In the Matter of Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

Cited in Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952); In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

§§ 1-175 to 1-178: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-179: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to separate trials, see Rule 42 of the Rules of Civil Procedure (§ 1A-1).

§ 1-180. Judge to explain law, but give no opinion on facts.—No judge, in giving a charge to the petit jury in a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided the judge shall give equal stress to the State and defendant in a criminal action. (1796, c. 452, P. R.; R. C., c. 31, s. 130; C. C. P., s. 237; Code, s. 413; Rev., s. 535; C. S., s. 564; 1949, c. 107; 1967, c. 954, s. 3.)

Cross Reference.

For similar provisions relating to civil actions, see Rule 51 of the Rules of Civil Procedure (§ 1A-1).

I. IN GENERAL.

Editor's Note.—

The 1967 amendment substituted "in a criminal action" for "either in a civil or criminal action" in the first sentence, and deleted "to the contentions of the plaintiff and defendant in a civil action, and" following "equal stress" in the proviso of the last sentence.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

For article discussing this section and possible return to Rule 51, federal Rules of Civil Procedure, in North Carolina, see 36 N.C. L. Rev. 1 (1957).

For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965).

For case law survey as to expression of opinion by trial judge, see 44 N.C.L. Rev. 1065 (1966); 45 N.C.L. Rev. 981 (1967).

Purpose of Section. — The founders of our legal system intended that the right of trial by jury should be a vital force in the administration of justice. They realized that this could not be if the petit jury should become a mere unthinking echo of the judge's will. To forestall such eventuality, they clearly demarcated the respective functions of the judge and the jury in both civil and criminal trials in the familiar statute now embodied in this section. In re Will of Bartlett, 235 N.C. 489, 70 S.E.2d 482 (1952).

This section establishes these fundamental propositions: (1) That it is the duty of the judge alone to decide legal questions presented at the trial, and to instruct the jury as to the law arising on the evidence given in the case; (2) that it is the task of the jury alone to determine the facts of the case from the evidence adduced; and (3) that "no judge, in giving a charge to the petit jury, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury." This section is designed to make effectual the right of every litigant to have his cause considered with the "cold neutrality of the impartial judge" and the equally unbiased mind of a properly instructed jury. In re Will of Bartlett, 235 N.C. 489, 70 S.E.2d 482 (1952); State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

The provisions of this section are mandatory, and a failure to comply is prejudicial error. Therrell v. Freeman, 256 N.C. 552, 124 S.E.2d 522 (1962).

This section creates a substantial legal right in the parties. Adams v Beaty Serv. Co., 237 N.C. 136, 74 S.E.2d 332 (1953).

It is a departure from the common-law rule and from the practice which prevails in the English courts, the federal courts, and in the courts of some of the states.

Everette v. D.O. Briggs Lumber Co., 250 N.C. 688, 110 S.E.2d 288 (1959).

And is to be strictly construed. Everette v. D.O. Briggs Lumber Co., 250 N.C. 688, 110 S.E.2d 288 (1959).

It has no application where the parties waive trial by jury. Everette v. D.O. Briggs Lumber Co., 250 N.C. 688, 110 S.E.2d 288 (1959).

Judge Not to Invade Prerogative of Jury.—This section denies the judge presiding at a jury trial the right in any manner or in any form, by word of mouth or by action, to invade the prerogative of the jury in its right to find the facts. In re Will of Holcomb, 244 N.C. 391, 93 S.E.2d 454 (1956).

The sole purpose of the portion of this section as to giving an opinion, is to prevent judges from invading the province of the jury. Everette v. D.O. Briggs Lumber Co., 250 N.C. 688, 110 S.E.2d 288 (1959).

Failure of the judge to observe and comply with the provisions of this section is error for which a new trial must be ordered. Adams v. Beaty Serv. Co., 237 N.C. 136, 74 S.E.2d 332 (1953).

This section requires that the judge shall declare and explain the law arising on the evidence given in the case. This is a substantial right of litigants. Failure to observe it is error for which the injured party is entitled to a new trial. State v. Jones, 254 N.C. 450, 119 S.E.2d 213 (1961).

Applied in Dillard v. Brown, 233 N.C. 551, 64 S.E.2d 843 (1951); Howard v. Carman, 235 N.C. 289, 69 S.E.2d 522 (1952); In re Humphrey, 236 N.C. 141, 71 S.E.2d 915 (1952); Fleming v. Atlantic Coast Line R.R., 236 N.C. 568, 73 S.E.2d 544 (1952); Goodwin v. Green, 237 N.C. 244, 74 S.E.2d 630 (1953); State v. Williamson, 238 N.C. 652, 78 S.E.2d 763 (1953); Honeycutt v. Bryan, 240 N.C. 238, 81 S.E.2d 653 (1954); Murray v. Wyatt, 245 N.C. 123, 95 S.E.2d 541 (1956); State v. Robbins, 246 N.C. 332, 98 S.E.2d 309 (1957); State v. Dutch, 246 N.C. 438, 98 S.E.2d 475 (1957); Poindexter v. First Nat'l Bank, 247 N.C. 606, 101 S.E.2d 682 (1958); DeBruhl v. State Highway & Pub. Works Comm'n, 247 N.C. 671, 102 S.E.2d 229 (1958); State v. Brown, 251 N.C. 216, 110 S.E.2d 892 (1959); North Asheboro-Central Falls Sanitary Dist. v. Canoy, 252 N.C. 749, 114 S.E.2d 577 (1960); In re Will of Sessom, 254 N.C. 369, 119 S.E.2d 193 (1961); Graver v. Rundle, 255 N.C. 744, 122 S.E.2d 720 (1961); General Tire & Rubber Co. v. Distributors, Inc., 256 N.C. 561, 124 S.E.2d 508 (1962); Wagner v. Eudy, 257 N.C. 199, 125 S.E.2d 598 (1962); Nello L. Teer Co. v. Dickerson, Inc., 257 N.C. 522, 126 S.E.2d 500 (1962); Yates v. W.F. Mickey Body Co., 258 N.C. 16, 128 S.E.2d 11 (1962); Hewett v. Bullard, 258 N.C. 347, 128 S.E.2d 411 (1962); Queen v. Jarrett, 258 N.C. 405, 128 S.E.2d 894 (1963); Pettus v. Sanders, 259 N.C. 211, 130 S.E.2d 330 (1963); State Highway Comm'n v. Kenan Oil Co., 260 N.C. 131, 131 S.E.2d 665 (1963); State v. Harrington, 260 N.C. 663, 133 S.E.2d 452 (1963); Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964); State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334 (1964); State v. Bailey, 261 N.C. 783, 136 S.E.2d 37 (1964); State v. Lawrence, 262 N.C. 162, 136 S.E.2d 595 (1964); Bell v. Price, 262 N.C. 490, 137 S.E.2d 824 (1964); Adams v. Adams, 262 N.C. 556, 138 S.E.2d 204 (1964); State v. Morgan, 263 N.C. 400, 139 S.E.2d 708 (1965); State v. Summers, 263 N. C. 517, 139 S.E.2d 627 (1965); Upchurch v. Hudson Funeral Home, Inc., 263 N.C. 560, 140 S.E.2d 17 (1965); Pinyan v. Settle, 263 N.C. 578, 139 S.E.2d 863 (1965); State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965); Duke Power Co. v. Black, 263 N.C. 811, 140 S.E.2d 540 (1965); State v. Carroll, 265 N.C. 592, 144 S.E.2d 656 (1965); State v. Bynum, 265 N.C. 732, 145 S.E.2d 5 (1965); Haynie v. Queen, 266 N.C. 758, 147 S.E.2d 188 (1966); State v. Green, 266 N.C. 785, 147 S.E.2d 377 (1966); State v. Matthews, 267 N.C. 244, 148 S.E.2d 38 (1966); State v. Leake, 267 N.C. 662, 148 S.E.2d 630 (1966); State v. Turner, 268 N.C. 225, 150 S.E.2d 406 (1966); State v. Fields, 268 N.C. 456, 150 S.E.2d 852 (1966); State v. Barber, 268 N.C. 509, 151 S.E.2d 51 (1966); State v. Green, 268 N.C. 690, 151 S.E.2d 606 (1966); Griffin v. Watkins, 269 N.C. 650, 153 S.E.2d 356 (1967); Murchison v. Powell, 269 N.C. 656, 153 S.E.2d 352 (1967); State v. Barber, 270 N.C. 222, 154 S.E.2d 104 (1967); State v. Tippett, 270 N.C. 588, 155 S.E.2d 269 (1967); State v. Cooke, 270 N.C. 644, 155 S.E.2d 165 (1967); State v. Jent, 270 N.C. 652, 155 S.E.2d 171 (1967); Lawson v. Benton, 272 N.C. 627, 158 S.E.2d 805 (1968); Roberts v. Pilot Freight Carriers, 273 N.C. 600, 160 S.E.2d 712 (1968); Potts v. Howser, 274 N.C. 49, 161 S.E.2d 737 (1968); State v. Frye, 1 N.C. App. 542, 162 S.E.2d 91 (1968); In re Will of Honeycutt, 1 N.C. App. 595, 162 S.E.2d 87 (1968); State v. Stanley, 1 N.C. App. 628, 162 S.E.2d 123 (1968); Woodward v. Shook, 3 N.C. App. 129, 164 S.E.2d 46 (1968); Wilson Redevelopment Comm'n v. Stewart, 3 N.C. App. 271, 164 S.E.2d 495 (1968); State v. Bertha, 4 N.C. App. 422, 167 S.E.2d 33 (1969).

Quoted in Mattox v. Huneycutt, 3 N.C. App. 63, 164 S.E.2d 28 (1968).

Stated in Short v. Chapman, 261, N.C. 674, 136 S.E.2d 40 (1964).

Cited in Morris v. Wrape, 233 N.C. 462, 64 S.E.2d 420 (1951); State v. Russell, 233 N.C. 487, 64 S.E.2d 579 (1951); State v. Parker, 234 N.C. 236, 66 S.E.2d 907 (1951); Poniros v. Nello L. Teer Co., 236 N.C. 144, 72 S.E.2d 9 (1951); Macon v. Murray, 236 N.C. 484, 73 S.E.2d 165 (1952); Atlantic Coast Line R.R. v. McLean Trucking Co., 238 N.C. 422, 78 S.E.2d 159 (1953); Mills v. Bonin, 239 N.C. 498, 80 S.E.2d 365 (1954); McDevitt v. Chandler, 241 N.C. 677, 86 S.E.2d 438 (1955); State v. Phelps, 242 N.C. 540, 89 S.E.2d 132 (1955); Tillman v. Talbert, 244 N.C. 270, 93 S.E.2d 101 (1956); Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956); State v. Crisp, 244 N.C. 407, 94 S.E.2d 402 (1956); Deaton v. Coble, 245 N.C. 190, 95 S.E.2d 569 (1956); State v. Morgan, 245 N.C. 215, 95 S.E.2d 507 (1956); Taylor v. Hunt, 248 N.C. 330, 103 S.E.2d 287 (1958); State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958); State v. Corl, 250 N.C. 258, 108 S.E.2d 615 (1959); Warner v. Gulf Oil Corp., 178 F. Supp. 481 (M.D.N.C. 1959); State v. Gooding, 251 N.C. 175, 110 S.E.2d 865 (1959); State v. Grundler, 251 N.C. 177, 111 S.E.2d 1 (1959); Tillis v. Calvine Cotton Mills, Inc., 251 N.C. 359, 111 S.E.2d 606 (1959); Gauldin v. Stokes Lumber Co., 253 N.C. 579, 117 S.E.2d 393 (1960); Crown Cent. Petroleum Corp. v. Page-Myers Oil Co., 255 N.C. 167, 120 S.E.2d 594 (1961); State v. Hart, 256 N.C. 645, 124 S.E.2d 816 (1962); Clifton v. Turner, 257 N.C. 92, 125 S.E.2d 339 (1962); Phillips v. North Carolina R.R., 257 N.C. 239, 125 S.E.2d 603 (1962); Carter v. Bradford, 257 N.C. 481, 126 S.E.2d 158 (1962); Haltiwanger v. Charlotte Amusement Co., 261 N.C. 180, 134 S.E.2d 198 (1964); Massey v. Smith, 262 N.C. 611, 138 S.E.2d 237 (1964); Brown v. Griffin, 263 N.C. 61, 138 S.E.2d 823 (1964); Slaughter v. Slaughter, 264 N.C 732, 142 S.E.2d 683 (1965); Consolidated Vending Co. v. Turner, 267 N.C. 576, 148 S.E.2d 531 (1966); Wooten v. Cagle, 268 N.C. 366, 150 S.E.2d 738 (1966); Underwood v. Gay, 268 N.C. 715, 151 S.E.2d 590 (1966); Chalmers v. Womack, 269 N.C. 433, 152 S.E.2d 505 (1967); State v. Fuller, 270 N.C. 710, 155 S.E.2d 286 (1967); Gregory v. Lynch, 271 N.C. 198, 155 S.E.2d 488 (1967); State v. Staten, 271 N.C. 600, 157 S.E.2d 225 (1967); State v. Feaganes, 272 N.C. 246, 158 S.E.2d 89 (1967); King v. Higgins, 272 N.C. 267, 158 S.E.2d 67 (1967); State v. Clayton, 272 N.C. 377, 158 S.E.2d 557 (1968); State v. Cooper, 273 N.C. 51, 159 S.E.2d 305 (1968); S & W Realty & Bonded Commercial Agency v. Duckworth & Shelton, Inc., 274 N.C. 243, 162 S.E.2d 486 (1968); Bryan Builders Supply v. Midyette, 274 N.C. 264, 162 S.E.2d 507 (1968); Pickard v. Burlington Belt Corp., 2 N.C. App. 97, 162 S.E.2d 601 (1968); State v. Martin, 2 N.C. App. 148, 162 S.E.2d 667 (1968); State Highway Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968); State v. Snyder, 3 N.C. App. 114, 164 S.E.2d 42 (1968); State v. Battle, 4 N.C. App. 588, 167 S.E.2d 476 (1969); In re Will of Goodson, 4 N.C. App. 257, 166 S.E.2d 447 (1969).

II. OPINION OF JUDGE.

A. General Consideration.

Purposes and Effect of Section.—

In accord with 2nd paragraph in original. See State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

In accord with 5th paragraph in original. See State v. Shinn, 234 N.C. 397, 67 S.E.2d 270 (1951); Belk v. Schweizer, 268 N.C. 50, 149 S.E.2d 565 (1966).

The law imposes on the trial judge the duty of absolute impartiality. The expression of an opinion by the trial court on an issue of fact to be submitted to a jury, being prohibited by this section, is a legal error. Nowell v. Neal, 249 N.C. 516, 107 S.E.2d 107 (1959); Belk v. Schweizer, 268 N.C. 50, 149 S.E.2d 565 (1966).

The court in its charge may not intimate or express an opinion as to the facts, the weight of the evidence, or the credibility of the witnesses, either directly or indirectly, in any manner, and if the judge does intimate or express such an opinion, it is prejudicial. Belk v. Schweizer, 268 N.C. 50, 149 S.E.2d 565 (1966).

Every suitor is entitled by the law to have his cause considered with the cold neutrality of the impartial judge and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

The trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

The judge occupies an exalted station, and jurors entertain a profound respect for his opinion. As a consequence, the judge prejudices a party or his cause in the minds of the trial jurors whenever he violates this section by expressing an adverse opinion on the facts. When this occurs, it is virtually impossible for the judge to remove the prejudicial impression from the minds of the trial jurors by anything which he may afterwards say to them by way of atonement or explanation. State v. Carter, 268 N.C. 648, 151 S.E.2d 602 (1966).

This section imposes upon the trial judge the duty to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon, without expressing any opinion of the facts. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

A Substantial Right, etc.—

Every person charged with crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

This section forbids the judge to intimate his opinion, etc.—

In accord with original. See State v. Wallace, 251 N.C. 378, 111 S.E.2d 714 (1959).

This section has been construed to include any opinion or even an intimation of the judge, at any time during the trial, calculated to prejudice either of the parties with the jury. Everette v. D.O. Briggs Lumber Co., 250 N.C. 688, 110 S.E.2d 288 (1959)

The trial judge is expressly forbidden to convey to the jury in any manner at any stage of the trial his opinion as to how the jury should determine a question of fact. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

This section forbids a judge to express to the jury his opinion on the facts of the case he is trying. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

The trial judge is forbidden by this section to express an opinion upon the evidence in any manner during the course of the trial or in his instructions to the jury. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

The expression by the court in the presence of the jury of an opinion concerning a fact to be found by the jury is forbidden by this section. State v. Carter, 268 N.C. 648, 151 S.E.2d 602 (1966).

There must be no indication of the judge's opinion upon the facts to the hurt of either party, either directly or indirectly, by words or conduct. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

Proof must be made without intimation or suggestion from the court that the controverted facts have or have not been established. State v. Patton, 2 N.C. App. 605, 163 S.E.2d 542 (1968).

The slightest intimation from the judge as to the weight, importance, or effect of the evidence has great weight with the jury, and, therefore, the Supreme Court must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial. State v. Patton, 2 N.C. App. 605, 163 S.E.2d 542 (1968).

Section Not Confined to Charge.—

In accord with original. See In re Will of Bartlett, 235 N.C. 489, 70 S.E.2d 482 (1952).

Although this section refers in terms to the charge, it has always been construed to forbid the judge to convey to the trial jury in any way at any stage of the trial his opinion on the facts involved in the case. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

This section does not apply to the charge alone, but prohibits a trial judge from asking questions or making comments at any time during the trial which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness. Galloway v. Lawrence, 266 N.C. 245, 145 S.E.2d 861 (1966); State v. Patton, 2 N.C. App. 605, 163 S.E.2d 542 (1968).

Section Applies Throughout Trial.—

In accord with 1st paragraph in original. See State v. Williamson, 250 N.C. 204, 108 S.E.2d 443 (1959); State v. Walker, 266 N.C. 269, 145 S.E.2d 833 (1966).

In accord with 2nd paragraph in original. See State v. Smith, 240 N.C. 99, 81 S.E.2d 263 (1954).

In accord with 3rd paragraph in original. See Hyder v. Asheville Storage Battery Co., 242 N.C. 553, 89 S.E.2d 124 (1955).

The trial of a case begins within the purview of this section when the prospective jurors are called to be examined touching their fitness to serve on the trial jury. This being so, it is a violation of the section for the judge to communicate his opinion on the facts in the case to the trial jury by his remarks or questions to prospective jurors during the selection of the trial jury. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

Manner of Stating Contentions of Parties.—The prohibition against the court expressing an opinion on the evidence applies to the manner of stating the contentions of the parties as well as in any other portion of the charge. State v. Watson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

Although a statement of contentions is permissible, the trial judge must exercise extreme care to retain, and convey the appearance of retaining, a cold neutrality. State v. Watson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

Where the court expresses an opinion upon the weight of the evidence while stating contentions, it is not required that it must be brought to the trial judge's attention before verdict; this question can be considered for the first time on appeal upon exceptions duly noted. State v. Watson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

Motive of Judge Immaterial.—

In accord with original. **See State v.** Shinn, 234 N.C. 397, 67 S.E.2d 270 (1951); State v. Smith, 240 N.C. 99, 81 S.E.2d 263 (1954).

Whether the conduct or the language of the judge amounts to an expression of his opinion on the facts is to be determined by its probable meaning to the jury, and not by the motive of the judge State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

When Equal Protection Clause Violated.—The equal protection clause of the Fourteenth Amendment of the United States Constitution is not violated by prejudicial remarks of the judge unless there is shown to be an element of intentional or purposeful discrimination and the burden of showing this is on the accused. Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C.), cert. denied, 365 U.S. 855, 81 S. Ct. 816, 5 L. Ed. 2d 819 (1961).

Inadvertent Expression of Opinion. — The fact that an expression of opinion by the trial court upon the evidence is an inadvertence renders such error nonetheless harmful. Miller v. Norfolk S. Ry., 240 N.C. 617, 83 S.E.2d 533 (1954); Burkey v. Kornegay, 261 N.C. 513, 135 S.E.2d 204 (1964).

Prejudicial Impression Not Removed by Subsequent Explanation. — The judge prejudices a party or his cause in the minds of the trial jurors whenever he violates this section by expressing an adverse opinion on the facts. When this occurs, it is virtually impossible for the judge to remove the prejudicial impression from the minds of the trial jurors by anything which he may afterwards say to them by way of atonement or explanation. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

Once the trial judge has given, in the presence of the jury, the slightest intimation, directly or indirectly, of his opinion concerning a fact to be found by the jury or concerning the credibility of testimony given by a witness, such error cannot be corrected by instructing the jury not to consider the expression by the court. State v. Carter, 268 N.C. 648, 151 S.E.2d 602 (1966).

Harmless Error.—The comment made or the question propounded should be considered in the light of all the facts and attendant circumstances disclosed by the record, and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless. State v. Hoyle, 3 N.C. App. 109, 164 S.E.2d 83 (1968).

Weight and Sufficiency of Evidence, etc.—

Discrepancies and contradictions in the evidence are for the jury and not for the court. Jones v. Johnson, 267 N.C. 656, 148 S.E.2d 583 (1966).

If diverse inferences may be drawn from the evidence, some favorable to the plaintiff and others to the defendant, the case should be submitted to the jury for final determination. Jones v. Johnson, 267 N.C. 656, 148 S.E.2d 583 (1966).

The question of the admissibility of evidence is for the judge; whether there is evidence and its weight and credibility are for the jury. State v. Perry, 3 N.C. App. 356, 164 S.E.2d 629 (1968).

Objections Must Be Made in Apt Time.—The general rule is that objections to the charge in stating the contentions of the parties or in recapitulating the evidence must be called to the court's attention in apt time to afford opportunity for correction, in order that an exception thereto will be considered on appeal. State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15 (1969).

Credibility of Witnesses Is for Jury.—

No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility. State v. Simpson, 233 N.C. 438, 64 S.E.2d 568 (1951); State v. Kimbrey, 236 N.C. 313, 72 S.E.2d 677 (1952); State v. Hopson, 265 N.C. 341, 144 S.E.2d 32 (1965). See State v. Smith, 240 N.C. 99, 81 S.E.2d 263 (1954).

This section prohibits a trial judge from asking questions which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness, and from asking a witness questions for the purpose of impeaching him or casting doubt on his testimony Greer v Whittington, 251 N.C. 630, 111 S.E.2d 912 (1960).

Record on Appeal Must Show Error.— In accord with 3rd paragraph in original. See State v. Thomas, 244 N.C. 212, 93 S.E.2d 63 (1956).

Correctness of Instructions, etc.—

Where the charge of the court to the jury does not appear in the record, it will be presumed that the court correctly charged the jury as to the law arising upon the evidence as required by this section. State v. Strickland, 254 N.C. 658, 119 S.E.2d 781 (1961).

B. What Constitutes an Opinion.

Direct Language Not Necessary, etc.— In accord with 1st paragraph in original. See State v. Simpson, 233 N.C. 438, 64 S.E.2d 568 (1951); State v. Shinn, 234 N.C. 397, 67 S.E.2d 270 (1951).

It can make no difference in what way or manner or when the opinion of the judge is conveyed to the jury, whether directly or indirectly by comment on the testimony of a witness, by arraying the evidence unequally in the charge, by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone and tenor of the trial. This section forbids any intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. State v. Simpson, 233 N.C. 438, 64 S.E.2d 568 (1951); Evans v. C.C. Bova & Co., 263 N.C. 91, 138 S.E.2d 781 (1964); State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

If the judge intimates an opinion by his manner of stating the evidence, by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone and tenor of the trial, he violates this section. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

It can make no difference in what way or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, or by the general tone and tenor of the trial, this section forbids an intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. State v. McBryde, 270 N.C. 776, 155 S.E.2d 266 (1967); State v. Davis, 272 N.C. 102, 157 S.E.2d 671 (1967).

Taking Witness into Custody, etc.—

Where the court audibly told the defendant's chief witness in the presence of the jury not to leave the courtroom, and shortly thereafter the witness was placed in custody in the prisoner's box in plain view of the jury, the incident must have resulted in weakening the testimony of the witness in the eyes of the jury and constituted a violation of this section. State v. McBryde, 270 N.C. 776, 155 S.E.2d 266 (1967).

Intimation That Controverted Facts Have or Have Not Been Established.— Proof must be made without intimation or suggestion from the court that the controverted facts have or have not been established. State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963).

Declaration That Evidence Tends to Show Fact Beyond Reasonable Doubt.— The credibility of the evidence is always for the jury and the judge may never declare that all the evidence tends to show any fact beyond a reasonable doubt. State v. Kimball, 261 N.C. 582, 135 S.E.2d 568 (1964).

Remark That Fact Is "Sufficiently Proved."—

No judge, in giving a charge to the petit jury shall give an opinion whether a fact is fully or sufficiently proven that being the true office and province of the jury Williams v. State Highway Comm'n, 252 N.C. 514, 114 S.E.2d 340 (1960).

Assumption That Fact Controverted by Plea of Not Guilty Has Been Established.—The assumption by the court that any fact controverted by a plea of not guilty has been established is prejudicial error. State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963); State v. Patton, 2 N.C. App. 605, 163 S.E.2d 542 (1968).

An expression of opinion or assumption by the trial court that all the essential elements of the offenses charged, which were controverted and put in issue by defendant's plea of not guilty, were not challenged and not denied by the defendant was prejudicial error. State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963).

Remarks Must Be Prejudicial.—

In accord with 3rd paragraph in original. See State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

Burden of Showing Prejudice.—Petitioner has the burden of showing that the judge's remarks constituted prejudicial error. Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C.), cert. denied, 365 U.S. 855, 81 S. Ct. 816, 5 L. Ed. 2d 819 (1961).

The use of the convenient formula, etc.— The use of the phrase "the State has presented evidence in this case which tends to show" in arraying the State's evidence, the same phrase being used when arraying defendant's evidence, did not constitute error as an expression of opinion by the court on the evidence. State v. Huggins, 269 N.C. 752, 153 S.E.2d 475 (1967).

The use of the terms "has offered evidence in substance tending to show" and "offered evidence tending further to show" is not an expression of opinion in violation of this section. Womble v. Morton, 2 N.C. App. 84, 162 S.E.2d 657 (1968).

Time Spent in Outlining Evidence of One Party.— In accord with original. See Bryant v. Watford, 240 N.C. 333, 81 S.E.2d 926 (1954).

Questioning Witness.—A trial judge has undoubted power to interrogate a witness for the purpose of clarifying matters material to the issues. But he violates this section and commits reversible error in so doing if he puts to a witness questions which convey to the jury his opinion as to what has, or has not, been proved by the testimony of such witness. In re Will of Bartlett, 235 N.C. 489, 70 S.E.2d 482 (1952).

The presiding judge, in order to make for better understanding or clarification of what a witness has said or intended to say, or to develop some relevant fact overlooked, is entirely justified in propounding competent questions to a witness, but in doing so care should be exercised to prevent by manner or word what may be understood by the jury as the indirect expression of an opinion on the facts. State v. Kimbrey, 236 N.C. 313, 72 S.E.2d 677 (1952); Greer v. Whittington, 251 N.C. 630, 111 S.E.2d 912 (1960).

It is improper for a trial judge to ask questions which are reasonably calculated to impeach or discredit a witness. Cross-examination for the purpose of impeachment is the prerogative of counsel, including the district solicitor, but it is never the privilege of the trial judge. State v. Kimbrey, 236 N.C. 313, 72 S.E.2d 677 (1952).

It is improper for a trial judge to ask questions for the purpose of impeaching a witness. State v. Hoyle, 3 N.C. App. 109, 164 S.E.2d 83 (1968).

Questions which serve only to clarify and promote a proper understanding of the testimony of the witnesses do not amount to an expression of opinion by the judge. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968).

It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so. Such examinations should be conducted with care and in a manner which avoids prejudice to either party. If by their tenor, their frequency, or by the persistence of the trial judge they tend to convey to the jury in any manner at any stage of the trial the "impression of judicial leaning," they violate the purpose and intent of this section and constitute prejudicial error. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968).

There are times in the course of a trial, when it becomes the duty of the judge to propound competent questions in order to obtain a proper understanding and clarification of the testimony of the witness or to bring out some fact that has been overlooked. But the trial judge should not by word or mannerism convey the impression to the jury that he is giving it the benefit of his opinion on the facts. State v. Hoyle, 3 N.C. App. 109, 164 S.E.2d 83 (1968).

Frequent Interruptions and Prolonged Questionings.—It is not unusual nor improper for a trial judge to ask questions of a witness to make clear his testimony on some point, and sometimes to facilitate the taking of testimony; but frequent interruptions and prolonged questionings by the court are not approved and may be held for prejudicial error if this tends to create in the minds of the jurors the impression of judicial leaning to one side or the other. Greer v. Whittington, 251 N.C. 630, 111 S.E.2d 912 (1960).

Assumption of Existence or Nonexistence of Material Fact.—The trial court in charging a jury may not give an instruction which assumes as true the existence or nonexistence of any material fact in issue. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

Test for Determining Prejudice.—The trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. The bare possibility, however, that an accused may have suffered prejudice from the conduct or language of the judge is not sufficient to overthrow an adverse verdict. The criterion for determining whether or not the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect of the language upon the jury. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. State v. Carter, 233 N.C. 581, 65

S.E.2d 9 (1951); Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C.), cert. denied, 365 U.S. 855, 81 S. Ct. 816, 5 L. Ed. 2d 819 (1961).

C. Illustrative Cases.

1 Remarks Held Not Erroneous.

a. Remarks Concerning a Party to the Trial.

Status of Deceased as Boarder or Guest in Home.—The judge did not express an opinion in violation of this section when he instructed the jury: "There was—I would characterize it as limited evidence—about the status of these two principals, that is the deceased and the defendant, with respect to their association with this home. The evidence did indicate that the defendant was living with her parents. There was some evidence that indicated—but it's for you to say—what the status of the deceased was in that home, or his presence in that home was. It was not clear to the court whether he was a boarder, or whether he was a guest, or whether he was living there under some circumstances not clear to the court not fully revealed by the evidence. State v. Hefner, 3 N.C. App. 359, 164 S.E.2d 623 (1968).

c. Remarks Concerning Weight and Credibility of Testimony.

In prosecution for homicide committed in the attempted perpetration of a robbery, the charge of the court to the effect that if the jury were satisfied beyond a reasonable doubt that the defendants conspired and agreed to rob deceased, that one defendant committed acts in furtherance of the common design and agreed to share in the proceeds of the robbery, and that in furtherance of such plan and agreement, and while attempting to rob deceased, another defendant shot and killed deceased, the jury should return a verdict of guilty of murder in the first degree, was without error and did not contain an expression of opinion on the evidence in violation of this section. State v. Maynard, 247 N.C. 462, 101 S.E.2d 340 (1958).

Statement as to Qualification of Witness.—Where the statement of the court was no more than a statement holding that the witness was qualified to give opinion evidence, it was not prejudicial error. Paris v. Carolina Portable Aggregates, Inc., 271 N.C. 471, 157 S.E.2d 131 (1967).

d. Miscellaneous Remarks.

Question as to Payment.—In an action upon a contract, the trial judge did not express an opinion in violation of this section when he asked plaintiff's attorney: "What about demand of payment on this? You'd better ask him a question on that." Electro Lift, Inc. v. Miller Equip. Co., 4 N.C. App. 203, 166 S.E.2d 454 (1969).

Statement of judge that he had only stated that part of the evidence as seemed to be necessary to enable him to explain and apply the law did not constitute an expression of opinion but was in strict compliance with this section State v. Tyson, 242 N.C. 574, 89 S.E.2d 138 (1955).

The court's statement of certain of plaintiff's contentions as set out in the record did not amount to the expression of an opinion as to the credibility of witnesses and weight of the evidence, where a reading of the record discloses that the trial judge stated contentions, not only those made by plaintiffs, but those made by the defendant, and there was nothing in the record and case on appeal to show that the contentions as stated by the judge were not actually made by the respective parties. Higgins v. Beaty, 242 N.C. 479, 88 S.E.2d 80 (1955).

Statement Concerning Benefits to Property Owners from Construction of Highway.—Where the court, in charging the jury on the issue of damages, correctly instructs the jury to deduct general and special benefits accruing to petitioner from the construction of the highway, and correctly leaves it to the jury to determine the amounts, the fact that the court also states that it is a matter of common knowledge that the building of a highway brings certain benefits to property owners along the highway is insufficient to constitute prejudicial error as an expression of opinion by the court on a fact in issue. Simmons v. North Carolina State Highway & Pub. Works Comm'n, 238 N.C. 532, 78 S.E.2d 308 (1953).

2. Remarks Held Erroneous.

a. Remarks Concerning a Party to the Trial.

Reference by court to defendants as "three black cats in a white Buick" was prejudicial error affecting the credibility of the defendants as witnesses and injecting a prejudicial opinion of the court into the court's instructions. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

Duty to Find Defendant Guilty of Manslaughter. — The instruction "If you find the defendant, Mr. Hardee, guilty of murder in the second degree, you need not consider whether he is guilty of manslaughter. But if you find him not guilty of murder in the second degree, then it would be your duty to find him guilty of manslaughter, as charged in the bill of indictment," constitutes an expression of opinion by the judge which is prohibited by this section. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

Assumption That Defendant Fired Fatal Shot.—In homicide prosecution, instruction which assumed that defendant fired the fatal shot is erroneous as an expression of opinion by the trial court, since defendant's admission that he shot at the deceased and his stipulation that the cause of death resulted from gunshot wounds of the chest do not constitute an admission by defendant that he fired the fatal shot. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

b. Remarks Concerning Witnesses.

Endorsing Veracity of Witness. — The court, after interrogating a witness in regard to his knowledge of the signature of the decedent, at issue in the case, stated that as far as the court was concerned the witness knew decedent's signature. It was held that the endorsement of the veracity of the witness by the court constitutes prejudicial error. In re Will of Holcomb, 244 N.C. 391, 93 S.E.2d 454 (1956).

Instruction That Arresting Officer Had No Personal Interest or Bias.—In a prosecution for driving while under the influence of intoxicating liquor, an instruction to the jury, based on a contention by the State, that the police officer who apprehended defendant had no personal interest in the case or bias toward defendant and that the officer's only interest was in seeing that the law was complied with and in protecting innocent people operating their automobiles on the highway, was a prohibited expression of opinion by the court, and its repetition by the judge, even though stated as a contention, gave it an emphasis that would weigh too heavily upon the defendant. State v. Maready, 269 N.C. 750, 153 S.E.2d 483 (1967).

Characterizing Witness as "of Perhaps Weak Mentality."—This section prohibits the judge from expressing an opinion that "plaintiff offered the testimony of (naming the witness), a young lady of perhaps weak mentality." Burkey v. Kornegay, 261 N.C. 513, 135 S.E.2d 204 (1964).

Questioning of witness by judge, going beyond an effort to obtain a proper understanding and clarification of the witness's testimony, held to have conveyed to the jury an impression that he had an opinion on the facts in evidence adverse to the defendant. State v. McRae, 240 N.C. 334, 82 S.E.2d 67 (1954).

c. Remarks Concerning Weight and Credibility of Testimony.

Court's inadvertent comment that defendant's testimony was incredible and therefore defendant should not be considered a credible witness was a violation of this section. State v. Hopson, 265 N.C. 341, 144 S.E.2d 32 (1965).

Characterizing Statutory Inference as "Deep Presumption". — In characterizing the permissible inference raised by § 18-11 as "a deep presumption," the trial judge expressed an opinion as to the strength of the evidence. Such an expression is prohibited by this section. State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965).

Charge of Court Amounting to Erroneous Appraisal and Evaluation of Opinion Testimony.—See In re Will of Tatum, 233 N.C. 723, 65 S.E.2d 351 (1951).

d. Miscellaneous Remarks.

Reference to Hospital Bill. — In Cummings v. Queen City Coach Co., 220 N.C. 521, 17 S.E.2d 662 (1941), the trial judge committed prejudicial error by referring to a hospital bill for $118.00 in the charge to the jury when there was no evidence in the record of any such bill. Kuyrkendall v. Clark's Disct. Dep't Store, 5 N.C. App. 200, 167 S.E.2d 833 (1969).

Statement as to Violation of Statute.—In prosecution charging resisting lawful arrest in violation of § 14-223, statement of the trial court during the instructions that "the offense charged here was committed in violation of § 14-223" was held to constitute an expression of opinion. State v. Cooper, 4 N.C. App. 210, 166 S.E.2d 509 (1969).

Remarks Made in Interrogating Prospective Jurors as to Scruples against Capital Punishment.—Where the court, in interrogating prospective jurors in regard to their scruples against capital punishment, refers to several celebrated cases and asks them, in the presence of those immediately thereafter impaneled to try the case, whether they would not render a verdict calling for the death sentence in such cases, defendant must be awarded a new trial notwithstanding that the court thereafter cautions the jurors that he did not mean to compare the case at issue with the other cases. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

Regarding Duty to Furnish Additional Help. – The crucial question in this case was whether an employer was negligent in failing to provide an employee with additional help to perform the task which the employee was assigned to do alone

An instruction that if more than one person is required for the safe performance of a certain duty, "such as the one in question in this case," was held prejudicial error as an expression of opinion that the job in question required more than one man for its safe performance. Miller v. Norfolk S. Ry., 240 N.C. 617, 83 S.E.2d 533 (1954).

An instruction utilizing the expression "the defense of drunkenness is one which is dangerous in its application" is clearly an expression of opinion by a judge in giving a charge to a petit jury, which is prohibited by this section. State v. Oakes 249 N.C. 282, 106 S.E.2d 206 (1958).

Instructions in Prosecutions for Driving under Influence of Intoxicating Liquors Held Prejudicial Where Defendant Stated to Be Driver — See State v. Swaringen, 249 N.C. 38, 105 S.E.2d 99 (1958).

Instruction as to Result of Failure to Convict.—In a prosecution for driving a vehicle on a public highway while under the influence of intoxicating liquor, an instruction to the effect that the State contended the statute was enacted to protect life and property and if the jury should fail to "convict on this evidence, then the law or statute commonly referred to as 'the drunken driving' statute, would have no purpose and no effect" was held prejudicial as an expression of opinion by the court on the evidence. State v. Anderson, 263 N.C. 124, 139 S.E.2d 6 (1964).

In a prosecution for violations of the liquor laws the court, in explaining its ruling admitting testimony of a witness that he saw intimacies between girls and men on the occasion he purchased liquor at defendant's house, stated that "they both go hand in hand." The statement of the court was held prejudicial as intimating that evidence of the intimacy of the girls and men was direct proof of liquor dealings by defendant. State v. Williamson, 250 N.C. 204, 108 S.E.2d 443 (1959).

Quotations on Nagging Women in Divorce Action.—Where the court, charging the jury in a divorce action upon the nagging of a wife as constituting such indignity to the husband as to warrant a divorce a mensa et thoro, quoted a picturesque philippic on nagging and ended with a quotation from Proverbs on the difficulty of living with a brawling woman, the instruction, which must have been understood by the jury as a description of the wife's behavior, violated this section and constituted prejudicial error. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

For cases involving prejudicial comment, see Belk v. Schweizer, 268 N.C. 50, 149 S.E.2d 565 (1966).

III. EXPLANATION OF LAW AND EVIDENCE.

A. General Consideration of the Charge.

The Object of Instructions.—

In accord with 1st paragraph in original. See Western Conference of Original Free Will Baptists v. Miles, 259 N.C. 1, 129 S.E.2d 600 (1963); Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963).

The chief purpose of a charge is to aid the jury to understand clearly the case, and to arrive at a correct verdict Glenn v. City of Raleigh, 246 N.C. 469, 98 S.E.2d 913 (1957); Bulluck v. Long, 256 N.C. 577, 124 S.E.2d 716 (1962); Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963); Faison v. T & S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966); Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

One of the most important purposes of the charge is the elimination of irrelevant matters and causes of action or allegations as to which no evidence has been offered, and to thereby let the jury understand and appreciate the precise facts that are material and determinative. Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962).

A prime purpose of the charge is to eliminate irrelevant matter or allegations not supported by evidence so that the jury may understand and appreciate the precise facts that are material and determinative. Nance v. Williams, 2 N.C. App. 345, 163 S.E.2d 47 (1968).

The purposes of the court's charge to the jury are the clarification of the issues, the elimination of extraneous matters, and the declaration and explanation of the law arising on the evidence in the case. North Carolina State Highway Comm'n v. Thomas, 2 N.C. App. 679, 163 S.E.2d 649 (1968).

A charge to the jury should present, etc.

In accord with original. See Hawkins v. Simpson, 237 N.C. 155, 74 S.E.2d 331 (1953); Finch v. Ward, 238 N.C. 290, 77 S.E.2d 661 (1953); State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969).

The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial error. This is true even though there is no special prayer for instructions to that effect. State v. Hornbuckle, 265 N.C. 312, 144 S.E.2d 12 (1965).

Instructions Must Be Sufficiently Definite.—It is incumbent upon the trial judge to give the jury sufficiently definite instructions to guide them to an intelligent determination of the question. Kuyrkendall v. Clark's Disct. Dept. Store, 5 N.C. App. 200, 167 S.E.2d 833 (1969).

But the trial judge is not required to instruct the jury with any greater particularity upon any element of the offense than is necessary to enable the jury to apply the law with respect to such element to the evidence bearing thereon. State v. Thacker, 5 N.C. App. 197, 167 S.E.2d 879 (1969).

Charge Must Be Considered as a Whole.—

When the charge of the trial court was considered contextually as a whole, as the Supreme Court is required to do, it was held to be clear that the trial judge declared and explained the law arising on all phases of the evidence. Nance v Long, 250 N.C. 96, 107 S.E.2d 926 (1959).

A charge is not subject to the objection that the court failed to explain the law on a particular aspect of the case when the charge, considered contextually and in connection with an immediately prior instruction upon a related aspect, adequately states the evidence to the extent necessary to explain the application of the law upon the aspect in question. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Ordinarily the presiding judge must instruct the jury extemporaneously from such notes as he may have been able to prepare during the trial. To require him to state every clause and sentence so precisely that even when lifted out of context it expressed the law applicable to the facts in the cause on trial with such exactitude and nicety that it may be held, in and of itself, a correct application of the law of the case would exact of the nisi prius judges a task impossible of performance. The charge is sufficient if, when read contextually, it clearly appears that the law of the case was presented to the jury in such manner as to leave no reasonable cause to believe that it was misled or misinformed in respect thereto. Jackson v. Jones, 2 N.C. App. 441, 163 S.E.2d 31 (1968).

Conflicting instructions upon a material aspect of the case must be held for prejudicial error, since it cannot be known which instruction was followed by the jury. Hardee v. York, 262 N.C. 237, 136 S.E.2d 582 (1964).

Charge Failing to Submit an Essential Element of Offense. — Where defendant testifies that he drove a vehicle on the highways of the State on the afternoon in question, then drank some wine and whiskey and became drunk about midafternoon, but denies that he drove a vehicle after becoming intoxicated, a charge to the effect that defendant admitted that he was drunk and that the only question for the jury was whether he drove his vehicle at any time on the afternoon in question, must be held for prejudicial error in failing to submit to the jury the essential element of the offense of whether defendant, while intoxicated, drove on a highway of the State, and in charging that an essential element of the offense had been fully or sufficiently proven when defendant's testimony was not sufficiently broad or comprehensive to constitute an admission of this fact. State v. Hairr, 244 N.C. 506, 94 S.E.2d 472 (1956).

Charge on Matters Not Raised in Pleadings or Supported by Evidence Is Erroneous.—It is error for the judge to charge the jury as to matters materially affecting the issues but not raised in the pleadings or supported by the evidence in the case. Modern Elec. Co. v. Dennis, 259 N.C. 354, 130 S.E.2d 547 (1963).

Contentions Not Necessarily a Part, etc.—

A statement of contentions by the judge is not required. State v. Watson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

Taking More Time in Stating State's Contentions.—That the court necessarily takes more time in stating the State's contentions than in stating the defendant's contentions is not ground for objection State v. Sparrow, 244 N.C. 81, 92 S.E.2d 484 (1956).

The equal stress which this section requires to be given to contentions of the State and the defendant in a criminal action does not mean that the statement of the contentions of the State and of the defendant must be equal in length. State v. King, 256 N.C. 236, 123 S.E.2d 486 (1962).

In a trial where the evidence for the defendant is short, or where he may have chosen not to offer any evidence at all, his contentions will naturally be very few in contrast with those of the State where it may have introduced a great volume of testimony. State v. King, 256 N.C. 236, 123 S.E.2d 486 (1962).

Requests for Instructions Must Be Timely.—

Where the charge presents all substantive phases of the law arising upon the evidence, a party desiring instructions upon a subordinate feature must aptly tender a request therefor. Hennis Freight Lines v. Burlington Mills Corp., 246 N.C. 143, 97 S.E.2d 850 (1957).

Presumption That Court Correctly Instructed Jury.—When the judge's charge is not shown in the record of case on appeal, it will be presumed that the court correctly instructed the jury on every principle of law applicable to the facts in evidence. State v. Sears, 235 N.C. 623, 70 S.E.2d 907 (1952); State v. Faison, 246 N.C. 121, 97 S.E.2d 447 (1957).

Appellant Must Show Error and Prejudice.—The burden is upon the appellant not only to show error in the action of the court concerning instructions but also to make it appear that the result was materially affected thereby to his hurt. And while the form and manner in which the instructions were given may be open to criticism, the Supreme Court will not intervene unless the appellant was prejudiced thereby. Garland v. Penegar, 235 N.C. 517, 70 S.E.2d 486 (1952).

Broadside Exception Untenable.—An exception that the court "did not charge the jury as to the law on every substantial feature of the case embraced within the issues and arising on the evidence" is untenable as a broadside exception State v. Triplett, 237 N.C. 604, 75 S.E.2d 517 (1953).

Assignment of error that the judge failed "to explain and apply or correlate the law and highway safety statutes to the different phases of the evidence as provided in § 1-180" is too general and indefinite to present any question for decision. Unpointed, broadside exceptions will not be considered. State v. Woolard, 260 N.C. 133, 132 S.E.2d 364 (1963).

An assignment of error that the court failed to declare and explain the law applicable to the facts in the case, without pointing out what matters appellant contends were omitted, is a broadside exception. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966).

An argument in an appellate brief that the court failed to charge "as to the contentions of the defendant in accordance with § 1-180" is a broadside exception which is not sufficient. State v. McCaskill, 270 N.C. 788, 154 S.E.2d 907 (1967).

The Supreme Court will not go "on a voyage of discovery" to ascertain wherein the judge failed to explain adequately the law in the case. State v. Woolard, 260 N.C. 133, 132 S.E.2d 364 (1963).

Specific Prayers for Instruction.—When the charge is in substantial compliance with the requirements of this section, if a party desires further elaboration or explanation, he must tender specific prayers for instruction. Payne v. Lowe, 2 N.C. App. 369, 163 S.E.2d 74 (1968).

Errors Should Be, etc.—

Objections to the statement of contentions should be brought to the trial judge's attention in order that a misstatement can be corrected by the trial judge before verdict; otherwise they are deemed to have been waived. State v. Watson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

Assignment of Error Held Insufficient.—See Price v. Monroe, 234 N.C. 666, 68 S.E.2d 283 (1951).

B. Explanation Required.

1. In General.

Rule Stated.—

In accord with 1st paragraph in original. See Ammons v. North Am. Accident Ins. Co., 245 N.C. 655, 97 S.E.2d 251 (1957).

It is the duty of the trial court to apply the law to all substantial features of the case arising on the evidence. Ammons v. North Am. Accident Ins. Co., 245 N.C. 655, 97 S.E.2d 251 (1957); Whiteside v. McCarson, 250 N.C. 673, 110 S.E.2d 295 (1959).

This section imposes upon the trial judge the positive duty of declaring and explaining the law arising on the evidence as to all substantial features of the case. Saunders v. Warren, 267 N.C. 735, 149 S.E.2d 19 (1966).

The statute requires the judge to point out the essentials to be proved on the one side or the other, and to bring into focus the relations of the different phases of the evidence to the particular issues involved. Citizens Nat'l Bank v. Phillips, 236 N.C. 470, 73 S.E.2d 323 (1952); Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963); Miller v. Lucas, 267 N.C. 1, 147 S.E.2d 537 (1966). See Western Conference of Original Free Will Baptists v. Miles, 259 N.C. 1, 129 S.E.2d 600 (1963).

This section is complied with where the court fully instructs the jury as to the evidence and the contentions of the parties and defines the law applicable thereto. State v. McLean, 234 N.C. 283, 67 S.E.2d 75 (1951).

It is the duty of the court to state the evidence "to the extent necessary to explain the application of the law" arising thereon. In both civil and criminal cases, it is imperative, in the charge to the jury, that the law be declared, explained and applied to the evidence bearing on the substantial and essential features of the case without any request for special instructions. Brannon v. Ellis, 240 N.C. 81, 81 S.E.2d 196 (1954). See State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

A statement of the contentions of the parties together with a bare declaration of the law in general terms is not sufficient to meet the requirements of the provisions of this section It is imperative that the law be declared, explained, and applied to the evidence bearing on the substantial and essential features of the case. Hawkins v. Simpson, 237 N.C. 155, 74 S.E.2d 331 (1953).

Under this section, the trial judge is required to relate and apply the law to the variant factual situations having support in the evidence. Whiteside v McCarson, 250 N.C. 673, 110 S.E.2d 295 (1959); Lester Bros. v. J.M. Thompson Co., 261 N.C. 210, 134 S.E.2d 372 (1964); Faison v T & S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966).

The duty of a trial judge with respect to instructions to jurors is that "he shall declare and explain the law arising on the evidence." Hardee v. York, 262 N.C. 237, 136 S.E.2d 582 (1964).

The court is not required to give the jury a verbatim recital of the testimony. It must of necessity condense and summarize the essential features thereof. When its recital of the evidence does not correctly reflect the testimony of the witness in any particular respect, it is the duty of the counsel to call attention thereto and request a correction. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

This section requires the trial judge to apply the law to the various factual situations presented by the conflicting evidence, thus where defendant's testimony, if the jury found it to be true, would entitle him to a verdict of not guilty, he was entitled to have the legal effect of his evidence explained to them. State v. Keziah, 269 N.C. 681, 153 S.E.2d 365 (1967).

Where the court failed to explain and declare the law arising on the evidence presented by the defendant, this constituted prejudicial error. State v. Hornbuckle, 265 N.C. 312, 144 S.E.2d 12 (1965).

Where defendant's evidence, if accepted, discloses facts sufficient in law to constitute a defense to the crime for which he is indicted, the court is required to instruct the jury as to the legal principles applicable thereto. What weight, if any, is to be given such evidence, is for determination by the jury. State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969).

The judge may not escape the duty imposed upon him by this section, either by specific waiver of the parties or by attempting to place the burden upon counsel to make such a request. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

The parties are not required to make a request that the judge comply with the provisions of this section. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Discretion of the Court.—

In giving instructions the court is not required to follow any particular form and has wide discretion as to the manner in which the case is presented to the jury, but it has the duty to explain, without special request therefor, each essential element of the offense and to apply the law with respect to each element to the evidence bearing thereon. State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

Compliance Necessary to Assure Verdict under Law and on Evidence.—Unless the mandatory provision of this section is complied with, there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented. Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963); Miller v. Lucas, 267 N.C. 1, 147 S.E.2d 537 (1966).

Contention of Parties.—

A trial judge is not required by law to state the contentions of litigants to the jury. When, however, a judge undertakes to state the contentions of one party, he must also give the equally pertinent contentions of the opposing party. Brannon v. Ellis, 240 N.C. 81, 81 S.E.2d 196 (1954); State v. King, 256 N.C. 236, 123 S.E.2d 486 (1962); In re Will of Wilson, 258 N.C. 310, 128 S.E.2d 601 (1962); Watt v. Crews, 261 N.C. 143, 134 S.E.2d 199 (1964); Key v. Merritt-Holland Welding Supplies, 273 N.C. 609, 160 S.E.2d 687 (1968).

Where court gave the State's contentions on every phase of the testimony at great length and in detail, but gave the defendant's contentions in very brief, general terms, as though he had offered no evidence at all, the pertinent contentions arising from the defendant's evidence were not given as required by the provisions of this section. State v. Kluckhohn, 243 N.C. 306, 90 S.E.2d 768 (1956).

Whether a case on appeal discloses that the trial judge devoted more words, as shown by the number of printed lines, in stating contentions of plaintiff than in stating those of defendants, is not the test. It is a question whether the judge gives "equal stress" to the contentions of the plaintiff and of the defendant. Edgewood Knoll Apts., Inc. v. Braswell, 239 N.C. 560, 80 S.E.2d 653 (1954).

The equal stress, which this section requires be given to the contentions of the plaintiff and defendant in a civil action, does not mean that the statement of contentions of the respective parties must be equal in length. For instance, in a trial where the evidence of one party is very short, or he may have chosen not to introduce any evidence at all, his contentions will naturally be very few in contrast with the other party who may have introduced a great volume of testimony. Brannon v. Ellis, 240 N.C. 81, 81 S.E.2d 196 (1954).

An exception by the defendant charging that the judge gave unequal stress to the contentions of the State and the defendant, where the defendant offered no evidence, was held to be unfounded. State v. Smith, 238 N.C. 82, 76 S.E.2d 363 (1953).

Where the judge in his charge stated that it had taken longer to give a summary of the State's evidence than the defendants, but the jury were to attach no significance to that, and he gave equal stress to the contentions of the State and of the defendants, this was held not error. State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953).

Where the evidence of each party is approximately equal, a charge of the court which states the contentions of one party in grossly disproportionate length must be held for prejudicial error. Pressley v. Godfrey, 263 N.C. 82, 138 S.E.2d 770 (1964).

Where the court stated fully the contentions of the State but stated no contentions of defendant, the charge does not meet the requirement of this section as interpreted and applied in our decisions. State v. Crawford, 261 N.C. 658, 135 S.E.2d 652 (1964).

The trial judge failed to comply with the provisions of this section in that, after stating fully the contentions of the State, he failed to give equal stress to the contentions of defendant, and particularly to his contention that the State's evidence did not show any felonious intent to commit larceny. State v. Crawford, 261 N.C. 658, 135 S.E.2d 652 (1964).

Failure of the court to state the contention of defendant that the State's evidence completely failed to show that he had a felonious intent to commit larceny was highly prejudicial to defendant. State v. Crawford, 261 N.C. 658, 135 S.E.2d 652 (1964).

A charge gave proper balance to the contentions of the parties, although it was somewhat out of the ordinary in that, instead of reciting the evidence and applying the law thereto, the court interlaced and combined into one fabric the ultimate facts which, according to the contention of each party, the evidence established, and then applied the law thereto. Davis v. Parnell, 262 N.C. 616, 138 S.E.2d 285 (1964).

Where the court gives the contentions of the State and then states that it does not know what defendant contends, the instruction must be held prejudicial as contravening this section. State v. Robbins, 243 N.C. 161, 90 S.E.2d 322 (1955).

Explanation of Subordinate Features of Case.—

When a judge has charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it by prayers for instructions or other proper procedure. And where this is not done, objection may not be raised for the first time after trial. Peek v. Wachovia Bank & Trust Co., 242 N.C. 1, 86 S.E.2d 745 (1955); State v. Davis, 246 N.C. 73, 97 S.E.2d 444 (1957).

The court is not required to instruct on subordinate features of the case without a proper request therefor. Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962).

A party desiring further elaboration on a subordinate feature of the case must aptly tender request for further instructions. State v. Guffey, 265 N.C. 331, 144 S.E.2d 14 (1965).

An exception to an excerpt from the charge ordinarily does not challenge the omission of the court to charge further on the same or another aspect of the case. Peek v. Wachovia Bank & Trust Co., 242 N.C. 1, 86 S.E.2d 745 (1955).

An instruction does not constitute an adequate charge on contributory negligence where, in essence, it is a statement of the contentions of the parties with respect thereto and not a declaration and explanation of the law arising on the applicable evidence as contemplated by this section. Dixon v. Wiley, 242 N.C. 117, 86 S.E.2d 784 (1955).

Failure to Charge on Concurring Negligence.—Tillman v. Bellamy, 242 N.C. 201, 87 S.E.2d 253 (1955).

2. Statement of Evidence.

In General.—

A summary of the material aspects of the evidence sufficient to bring into focus controlling legal principles is all that is required with respect to stating the evidence. Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962).

This section requires, on the part of the judge, a statement of the evidence to which he is attempting to apply the law. State v. Best, 265 N.C. 477, 144 S.E.2d 416 (1965).

The trial judge is not required to instruct the jury with any greater particularity upon any element of the offense than is necessary to enable the jury to apply the law with respect to such element to the evidence bearing thereon. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

This section requires a statement of the evidence to the extent necessary to explain the application of the law thereto. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

In reviewing the evidence, the trial court is not required to give a verbatim recital of the testimony, but only to the extent necessary to explain the application of the law thereto. In re Will of Head, 1 N.C. App. 575, 162 S.E.2d 137 (1968).

Duty of Counsel to Request Correction.—If the trial court's statement of the evidence in condensed form does not correctly reflect the testimony of the witness in any particular respect, it is the duty of counsel to call attention thereto and request a correction. In re Will of Head, 1 N.C. App. 575, 162 S.E.2d 137 (1968).

Recapitulation Unnecessary.—

The recapitulation of all the evidence is not required under this section, and nothing more is required than a clear instruction which applies the law to the evidence and gives the position taken by the parties as to the essential features of the case. State v. Thompson, 257 N.C. 452, 126 S.E.2d 58 (1962).

The court is not required to recapitulate the evidence, witness by witness. Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962); State v. Guffey, 265 N.C. 331, 144 S.E.2d 14 (1965).

In the instructions to the jury, recapitulation of all the evidence is not required, but the trial judge is required to state the evidence to the extent necessary to explain the application of the law thereto. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

Recapitulation of all the evidence is not required, and the statute is complied with in this respect by presentation of the principal features of the evidence relied on respectively by the prosecution and defense. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

Even though the parties waive a recapitulation of the evidence, such waiver does not relieve the judge of the duty under this section to state the evidence of the respective parties to the extent necessary to enable him to explain the application of the law thereto. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Where no evidence is stated except in the contentions of the parties, that does not meet the requirements of this section. Bulluck v. Long, 256 N.C. 577, 124 S.E.2d 716 (1962).

Contentions of Parties.—

A statement of the evidence only in the form of contentions in a complicated case where the evidence is conflicting is not a sufficient compliance with the requirements of this section. Eastern Carolina Feed & Seed Co. v. Mann, 258 N.C. 771, 129 S.E.2d 488 (1963).

Where Parties Waive Recapitulation of Evidence.—Even when the parties waive a recapitulation of the evidence, it is necessary that the court state the evidence to the extent necessary to explain the application of the law thereto State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

3. Explanation of Law.

In General.—

In accord with 1st paragraph in original. See Howard v. Carman, 235 N.C. 289, 69 S.E.2d 522 (1952); State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954); McNeill v. McDougald, 242 N.C. 255, 87 S.E.2d 502 (1955); Westmoreland v. Gregory, 255 N.C. 172, 120 S.E.2d 523 (1961).

In accord with 2nd paragraph in original. See Howard v. Carman, 235 N.C. 289, 69 S.E.2d 522 (1952); State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

In accord with 3rd paragraph in original. See Howard v. Carman, 235 N.C. 289, 69 S.E.2d 522 (1952).

The failure of the presiding judge to declare and explain the law arising upon the evidence is error Howard v Carman, 235 N.C. 289, 69 S.E.2d 522 (1952); Toler v. Brink's, Inc., 1 N.C. App. 315, 161 S.E.2d 208 (1968).

The Supreme Court has consistently ruled that this section imposes upon the trial judge the positive duty of declaring and explaining the law arising on the evidence as to all the substantial features of the case. A mere declaration of the law in general terms and a statement of the contentions of the parties is not sufficient to meet the statutory requirement. Glenn v. City of Raleigh, 246 N.C. 469, 98 S.E.2d 913 (1957); Rowe v. Fuquay, 252 N.C. 769, 114 S.E.2d 631 (1960); Byrnes v. Ryck, 254 N.C. 496, 119 S.E.2d 391 (1961); Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963); Miller v. Lucas, 267 N.C. 1, 147 S.E.2d 537 (1966).

It is the duty of the trial court to declare and explain the law arising on the evidence as to all substantial features of the case, without any special prayer for instructions to that effect, and a mere declaration of the law in general terms and a statement of the contentions of the parties is insufficient. Therrell v. Freeman, 256 N.C. 552, 124 S.E.2d 522 (1962).

Where the trial court states the contentions of the parties, but inadvertently fails to explain and declare the law arising on the evidence, assignment of error to the charge must be sustained. Keith v. Lee, 246 N.C. 188, 97 S.E.2d 859 (1957).

A mere statement of the contentions of the parties does not suffice. Patterson v. Buchanan, 265 N.C. 214, 143 S.E.2d 76 (1965).

Where the court did not state any of the evidence except in the form of contentions, this does not comply with the requirement of this section that the judge "shall declare and explain the law arising on the evidence given in the case." Faison v. T & S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966).

The judge must explain and apply the law to the specific facts pertinent to the issue involved. Saunders v. Warren, 267 N.C. 735, 149 S.E.2d 19 (1966); Tate v. Golding, 1 N.C. App. 38, 159 S.E.2d 276 (1968).

A mere declaration of the law in general terms and a statement of the contentions of the parties with respect to a particular issue is not sufficient to meet the requirements of the statute. Saunders v. Warren, 267 N.C. 735, 149 S.E.2d 19 (1966).

When the judge fails to declare and explain the law and apply it to the evidence bearing on the issue involved, the jurors, unfamiliar with legal standards, are left without benefit of such legal standards or standards necessary to guide them to a right decision on the issue. Saunders v. Warren, 267 N.C. 735, 149 S.E.2d 19 (1966).

It is the duty of the court to charge the law applicable to the substantive features of the case arising on the evidence without special request, and to apply the law to the various factual situations presented by the conflicting evidence. This requirement obtains as respects both the statutory law and the common law when both are applicable. A charge which fails to submit one of the material aspects of the case presented by the allegation and proof, is prejudicial. Overman v. Saunders, 4 N.C. App. 678, 167 S.E.2d 536 (1969).

A statement of what the parties contend the law to be is not sufficient. Tate v. Golding, 1 N.C. App. 38, 159 S.E.2d 276 (1968).

This section requires the trial judge to declare and explain the law arising on the evidence in the case. This is not done by the judge stating the contentions of the parties. Clayton v. Prudential Ins. Co. of America, 4 N.C. App. 43, 165 S.E.2d 763 (1969).

The judge is required by this section to charge the law on the substantial features of the case arising on the evidence given in the case, and give equal stress to the contentions of the parties. Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

The judge is required to declare and explain the law arising on the evidence without being requested to do so. State v. Jeffries, 3 N.C. App. 218, 164 S.E.2d 398 (1968).

This section imposes upon the trial judge the duty to declare and explain the law arising on the evidence as to all substantial features of the case. Tate v. Golding, 1 N.C. App. 38, 259 S.E.2d 276 (1968).

A failure to charge the law on the substantive features of the case arising on the evidence is prejudicial error. Payne v. Lowe, 2 N.C. App. 369, 163 S.E.2d 74 (1968).

The provisions of this section are mandatory. A failure to comply is prejudicial error. Godwin v. Hinnant, 250 N.C. 328, 108 S.E.2d 658 (1959).

If the mandatory requirements of this section are not observed, there can be no assurance that the verdict represents a finding by the jury under the law and the evidence presented. Saunders v. Warren, 267 N.C. 735, 149 S.E.2d 19 (1966).

It confers a substantial legal right, and imposes upon the trial judge a positive duty, and his failure to charge the law on the substantial features of the case arising on the evidence is prejudicial error, and this is true even without prayer for special instructions. Bulluck v. Long, 256 N.C. 577, 124 S.E.2d 716 (1962); Faison v. T & S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966).

The trial judge has the positive duty of instructing the jury as to the law upon all of the substantial features of the case. Lester Bros. v. J. M. Thompson Co., 261 N.C. 210, 134 S.E.2d 372 (1964).

Court Must Explain Law Arising on Evidence in Particular Case.—This section requires the court, in both criminal and civil actions, to declare and explain the law arising on the evidence in the particular case and not upon a set of hypothetical facts. State v. Street, 241 N.C. 689, 86 S.E.2d 277 (1955); State v. Campbell, 251 N.C. 317, 111 S.E.2d 198 (1959).

Even though the parties waive a recapitulation of the evidence, such waiver does not relieve the court of the duty to declare and explain the law arising on the evidence of the respective parties. Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962).

It is prejudicial error to instruct in regard to law not presented by the evidence.

White v. Cothran, 260 N.C. 510, 133 S.E.2d 132 (1963).

Absence of Request for Special Instructions.—

In accord with 1st paragraph in original. See Barnes v. Caulbourne, 240 N.C. 721, 83 S.E.2d 898 (1954); Tillman v. Bellamy, 242 N.C. 201, 87 S.E.2d 253 (1955); McNeill v. McDougald, 242 N.C. 255, 87 S.E.2d 502 (1955); Williamson v. Clay, 243 N.C. 337, 90 S.E.2d 727 (1956); Whiteside v. McCarson, 250 N.C. 673, 110 S.E.2d 295 (1959); Lester Bros. v. J.M. Thompson Co., 261 N.C. 210, 134 S.E.2d 372 (1964).

Under this section it is obligatory for the trial judge to charge the jury as to the law upon every substantial feature of the case embraced within the issue and arising on the evidence without any special prayer for instruction to that effect State v. Brady, 236 N.C. 295, 72 S.E.2d 675 (1952).

It is the duty of the court, without a request for special instructions, to explain the law and to apply it to the evidence on all substantial features of the case. Melton v. Crotts, 257 N.C. 121, 125 S.E.2d 396 (1962).

Failure to charge the law on a substantive feature of case arising on defendant's pleading, even in the absence of special request for such instruction, is prejudicial error for which defendant is entitled to a new trial. Correll v. David L. Hartness Realty Co., 261 N.C. 89, 134 S.E.2d 116 (1964).

The trial court is required to charge the law upon all substantial features of the case arising on the evidence, even though there is no request for special instructions. King v. Britt, 267 N.C. 594, 148 S.E.2d 594 (1966).

It is the duty of the court, without request for special instructions, to explain the law and to apply it to the evidence on all substantial features of the case and to apply the law to the various factual situations presented by the conflicting evidence. Smart v. Fox, 268 N.C. 284, 150 S.E.2d 403 (1966).

The mandate of this section is not met. etc.—

See Spencer v. McDowell Motor Co., 236 N.C. 239, 72 S.E.2d 598 (1952).

An abstract proposition of law not pointing to the facts of the case at hand and not pertinent thereto should not be given to the jury. McGinnis v. Robinson, 252 N.C. 574, 114 S.E.2d 365 (1960).

It is error for the court to charge upon an abstract principle of law which is not presented by the allegations and evidence. Textile Motor Freight, Inc. v. DuBose, 260 N.C. 497, 133 S.E.2d 129 (1963); Pressley v. Pressley, 261 N.C. 326, 134 S.E.2d 609 (1964); Hardee v. York, 262 N.C. 237, 136 S.E.2d 582 (1964); Nance v. Williams, 2 N.C. 345, 163 S.E.2d 47 (1968).

In charging the jury, the stating of abstract principles of law is not sufficient. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

It has been held to be error to charge on an abstract principle of law not supported by the evidence. Kuyrkendall v. Clark's Disct. Dep't Store, 5 N.C. App. 200, 167 S.E.2d 833 (1969).

Charge Containing Only Declarations, etc.—

It is error for the court to charge on abstract principles of law not supported by any view of the evidence. Jordan v. Eastern Transit & Storage Co., 266 N.C. 156, 146 S.E.2d 43 (1966).

Declaration of legal principles in anticipation that they will arise on the evidence may conceivably lead to serious error. Hardee v. York, 262 N.C. 237, 136 S.E.2d 582 (1964).

Judge Must Explain Law as It Relates to Testimony.—

In accord with original. See Glenn v. City of Raleigh, 246 N.C. 469, 98 S.E.2d 913 (1957).

Implicit in the meaning of this statute is the requirement that the judge must declare and explain the law as it relates to the various aspects of the evidence offered bearing on all substantive phases of the case. Citizens Nat'l Bank v. Phillips, 236 N.C. 470, 73 S.E.2d 323 (1952); Harris v. Atlantic Greyhound Corp., 243 N.C. 346, 90 S.E.2d 710 (1956); Ammons v. North Am. Accident Ins. Co., 245 N.C. 655, 97 S.E.2d 251 (1957).

This section requires the presiding judge to declare and explain the law as it relates to the different aspects of the evidence on each side of the case, so as to bring into focus the relations between the different phases of the evidence and the applicable principles of law State v. Washington, 234 N.C. 531, 67 S.E.2d 498 (1951).

This section requires the trial judge, when instructing the jury, to relate and apply the law to the variant factual situations having support in the evidence. Correll v. Gaskins, 263 N.C. 212, 139 S.E.2d 202 (1964).

Where the court in charging the jury with reference to issues of negligence stated the principles of law in general terms and thereafter merely stated to the jury some of the testimony and some of the contentions of the parties and failed and neglected to state to the jury the application of the principles of law as to the facts arising from the evidence or any of the several possible findings of fact by the jury, it thereby failed to declare and explain the law arising on the evidence given in the case as required by this section. Brooks v. Honeycutt, 250 N.C. 179, 108 S.E.2d 457 (1959).

The judge is required to relate and apply the law to the variant factual situations supported by the evidence and based upon allegations in the pleadings. Clayton v. Prudential Ins. Co. of America, 4 N.C. App. 43, 165 S.E.2d 763 (1969).

And Must Declare and Explain Statutory as Well as Common Law.—The positive duty of the judge, required by this section, to declare and explain the law arising upon the evidence in the case means that he shall declare and explain the statutory law as well as the common law arising thereon. Pittman v. Swanson 255 N.C. 681, 122 S.E.2d 814 (1961); Greene v. Harmon, 260 N.C. 344, 132 S.E.2d 683 (1963); Correll v. Gaskins, 263 N.C. 212, 139 S.E.2d 202 (1964).

The failure to give an instruction applying the statutory law to the evidence constitutes prejudicial error for which defendant is entitled to a new trial. Correll v. Gaskins, 263 N.C. 212, 139 S.E.2d 202 (1964).

A bare declaration of the law in general terms and a statement of the contentions of the parties are not sufficient to meet the statutory requirement. Bulluck v. Long, 256 N.C. 577, 124 S.E.2d 716 (1962).

It is error to give the jury carte blanche to speculate and apply to the case their individual notions as to what might constitute negligence in any other way which the court might not have specifically mentioned. Modern Elec. Co. v. Dennis, 259 N.C. 354, 130 S.E.2d 547 (1963).

An instruction about a material matter not based on sufficient evidence is erroneous. McGinnis v. Robinson, 252 N.C. 574, 114 S.E.2d 365 (1960).

Charge of Breach of Law or Duty Must Be Supported by Allegation and Proof.— Before a breach of a particular law or duty may be submitted for jury determination, there must be both allegation and proof of such breach. Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962).

The court is not justified in giving instructions with respect to a principle of law not applicable to the evidence, merely because a breach of such law has been pleaded. Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962).

The court need not read a statute, etc.— In accord with original. See Kennedy v. James, 252 N.C. 434, 113 S.E.2d 889 (1960).

The court is not required to read a statute to the jury; a simple explanation of the law is generally preferable. Therrell v. Freeman, 256 N.C. 552, 124 S.E.2d 522 (1962).

And It Is Not Sufficient for the Court Merely to Read a Statute, etc.—

Ordinarily and except in cases of manifest factual simplicity, the rule is that it is not sufficient for the court merely to read a highway safety statute and leave the jury unaided to apply the law to the facts. Citizens Nat'l Bank v. Phillips, 236 N.C. 470, 73 S.E.2d 323 (1952).

It is not sufficient for the court to read a statute or to state the applicable law bearing on an issue in controversy, and leave the jury unaided to apply the law to the facts. Brannon v. Ellis, 240 N.C. 81, 81 S.E.2d 196 (1954); Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962); Eastern Carolina Feed & Seed Co. v. Mann, 258 N.C. 771, 129 S.E.2d 488 (1963).

It is not sufficient merely for the court to read a statute bearing on the issue in controversy and leave the jury unaided to apply the law to the facts. State v. Coggin, 263 N.C. 457, 139 S.E.2d 701 (1965).

The evidence was all offered by the plaintiff and was not in dispute. When the court, therefore, charged again as to the laws it was its duty to do more than read from the book. It was its duty to apply the law as given to the evidence in the case. Ammons v. North Am. Accident Ins. Co., 245 N.C. 655, 97 S.E.2d 251 (1957).

If the pertinent law is statutory a mere reading of the statute without applying the law to the evidence is insufficient. Therrell v. Freeman, 256 N.C. 552, 124 S.E.2d 522 (1962).

Ordinarily, the reading of the pertinent statute, without further explanation, is not sufficient. State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

It is error for a trial court to read a statute to the jury without giving an explanation thereof in connection with the evidence, where such explanation is patently necessary to inform the jury as to the meaning of the statute and as to its bearing on the case. Toler v. Brink's, Inc., 1 N.C. App. 315, 161 S.E.2d 208 (1968).

When the judge has correctly instructed the jury upon the law applicable to the various acts of negligence upon which the pleadings and evidence require a charge, there is no need to reassemble the parts and present them to the jury in a packaged proposition labeled reckless driving, for the whole is equal to the sum of its parts. If, however, he undertakes to do so, this section requires him to tell the jury what facts, which they might find from the evidence, would constitute reckless driving. It is not sufficient for the judge to read the statute and leave it to the jury to apply the law to the facts and to decide for themselves what plaintiff did, if anything, which constituted reckless driving. Ingle v. Roy Stone Transf. Corp., 271 N.C. 276, 156 S.E.2d 265 (1967).

If a party has properly pleaded reckless driving and the judge undertakes to charge upon it, this section requires him to tell the jury what facts they might find from the evidence would constitute reckless driving. It is not sufficient for the judge to read the statute and then leave it to the jury to apply the law to the facts and to decide for themselves what defendant's driver did, if anything, which constituted reckless driving. Nance v. Williams, 2 N.C. App. 345, 163 S.E.2d 47 (1968).

Simple Explanation without Technical Language May Be Preferable.—While the court must apply the law to the evidence, this is often better accomplished by a simple explanation without the involvement of the technical language of the statute. Pittman v. Swanson, 255 N.C. 681, 122 S.E.2d 814 (1961).

But Reading Statute and Pointing Out Material Parts Is Proper.—In a prosecution for conspiracy to defraud the Welfare Department, the act of the court in reading the statute upon which the indictment was based and pointing out the material parts which applied to the charge against the defendants did not amount to a peremptory instruction of guilt, and the instruction was in keeping with the court's duty to declare and explain the law of the case. State v. Butler, 269 N.C. 733, 153 S.E.2d 477 (1967).

Judge Not Relieved of Duty by Remarks of Solicitor.—The solicitor's statement at the beginning of the trial that he would ask for a verdict of guilty of rape with a recommendation of life imprisonment, or guilty of an attempt to commit rape, did not relieve the court of its mandatory duty under this section to declare and explain to the jury the law arising on the evidence given in the case State v. Green, 246 N.C. 717, 100 S.E.2d 52 (1957).

When Party Must Request, etc.—

In accord with 2nd paragraph in original See Barnes v. Caulbourne, 240 N.C. 721, 83 S.E.2d 898 (1954).

Where defendant relies in large measure upon what he contends are circumstances of acute emergency, the failure to comply with this section by applying the applicable legal principles to defendant's evidence in regard thereto must be regarded as prejudicial. Williamson v. Clay, 243 N.C. 337, 90 S.E.2d 727 (1956).

Waiver of Recapitulation of Evidence Does Not Relieve Court of Duty to Explain Law.—Though the parties waive a recapitulation of the evidence by the court, such waiver does not relieve the court of the duty to declare and explain the law arising on the evidence of the respective parties. Brannon v. Ellis, 240 N.C. 81, 81 S.E.2d 196 (1954).

Judge Must Instruct as to Burden of Proof.—This section places a duty upon the presiding judge to instruct the jury as to the burden of proof upon each issue arising upon the pleadings And it is error for him to discuss the facts and give the contentions of the parties without any reference to the burden of proof Tippite v. Atlantic Coast Line R.R., 234 N.C. 641, 68 S.E.2d 285 (1951).

This section requires that the judge "shall declare and explain the law arising on the evidence given in the case," which places a duty upon the presiding judge to instruct the jury as to the burden of proof upon each issue arising upon the pleadings. Watt v. Crews, 261 N.C. 143, 134 S.E.2d 199 (1964); Paris v. Carolina Portable Aggregates, Inc., 271 N.C. 471, 157 S.E.2d 131 (1967).

The burden of proof is a substantial right, and the failure of the charge to properly place the burden of proof is reversible error. Hardee v. York, 262 N.C. 237, 136 S.E.2d 582 (1964).

When the court correctly places the burden of proof and states the proper intensity of the proof required, the court is not required to define the term "greater weight of the evidence" in the absence of a prayer for special instructions Hardee v. York, 262 N.C. 237, 136 S.E.2d 582 (1964).

This section places a duty upon the presiding judge to instruct the jury as to the burden of proof upon each issue arising upon the pleadings. King v. Bass, 273 N.C. 353, 160 S.E.2d 97 (1968).

The rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary the burden rests; and, therefore, it should be carefully guarded and rigidly enforced by the court. King v. Bass, 273 N.C. 353, 160 S.E.2d 97 (1968).

Instruction Presenting Erroneous View of Law or Incorrect Application Thereof.

—It is the duty of the trial court to explain and apply the law to the substantive phases of the evidence adduced, and an instruction which presents an erroneous view of the law or an incorrect application thereof, even though given in stating the contentions of the parties, is error, the rule being that while ordinarily the misstatement of a contention must be brought to the trial court's attention in apt time, this is not necessary when the statement of the contention presents an erroneous view of the law or an incorrect application of it. Blanton v. Carolina Dairy, Inc., 238 N.C. 382, 77 S.E.2d 922 (1953); Harris v. White Constr. Co., 240 N.C. 556, 82 S.E.2d 689 (1954); Lookabill v. Regan, 245 N.C. 500, 96 S.E.2d 421 (1957).

An instruction which presents an erroneous view of the law upon a substantive phase of the case is prejudicial error. 902 (1963); Parker v. Bruce, 258 N.C. 341, White v. Phelps, 260 N.C. 445, 132 S.E.2d 128 S.E.2d 561 (1962).

Correcting Erroneous Instruction. —Where a judge has erroneously instructed the jury he undoubtedly has the right in fact it is his duty when the error is called to his attention to correct it by accurately informing the jury what the law is. If the subsequent instruction is sufficient to clearly point to the error previously committed and state the law in such manner that the jury cannot be under any misapprehension as to what the law is, the error previously committed will not warrant a new trial. Griffin v. Pancoast, 257 N.C. 52, 125 S.E.2d 310 (1962).

Where Failure to Charge Eliminates Substantial Part of Defense. — Where the plaintiff contended that there was a wrongful seizure of tobacco before defendant's liens were due, and defendant contended that by virtue of § 44-63 the liens were due and collectible since the crop was not being tended, the failure of the trial court to charge the provision of such section was prejudicial, since by such failure the trial court eliminated a substantial part of defendant's defense McNeill v McDougald, 242 N.C. 255, 87 S.E.2d 502 (1955).

C Illustrative Cases.

Negligence and Proximate Cause.—The following charge did not comply with the requirement of this section since it placed upon the jury the duty imposed on the judge: "If you find from the evidence and by its greater weight that the death of plaintiff's intestate was proximately caused by the negligence of the defendant as alleged in the complaint, applying these rules of law to the facts in the case, then it would be your duty to answer this issue 'Yes.' If you fail to so find, then it would be your duty to answer it 'No.'" Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962).

A peremptory instruction to answer the issue in favor of the plaintiff if the jury should find by the greater weight of the evidence that the defendant drove onto the shoulder to his left, and there struck the plaintiff standing on the shoulder, whether he saw or should have seen the plaintiff or not, with no explanation whatever of the meaning of negligence or of proximate cause, does not satisfy the requirement of this section. Jackson v. McBride, 270 N.C. 367, 154 S.E.2d 468 (1967).

Contributory Negligence.—

A charge on the issue of contributory negligence which merely gives the contentions of the parties, without defining contributory negligence and without explaining the law applicable to the facts in evidence, constitutes prejudicial error. Therrell v. Freeman, 256 N.C. 552, 124 S.E.2d 522 (1962).

Damages.—

The court must give sufficiently definite instructions on the issue of damages to guide the jury to an intelligent determination of the issue. North Carolina State Highway Comm'n v. Thomas, 2 N.C. App. 679, 162 S.E.2d 649 (1968).

Where the trial court did not give an instruction as to the burden of proof on the issue of damages, this omission violated a substantial right of defendant and was prejudicial error. Paris v. Carolina Portable Aggregates, Inc., 271 N.C. 471, 157 S.E.2d 131 (1967).

Instructions which tend to bolster the witnesses for the state, and to impair the effect of defendant's plea of not guilty, are violative of this section. State v Shinn, 234 N.C. 397, 67 S.E.2d 270 (1951).

Where court did not state rule for admeasurement of damages, a new trial was granted. Adams v. Beaty Serv., Co., 237 N.C. 136, 74 S.E.2d 332 (1953).

Intersections of Streets and Making Left Turn.—When the failure to explain the law so the jury could apply it to the facts is specifically called to the court's attention by a juror's request for information, it should tell the jury how to find the intersection of the streets as fixed by § 20-38 and how, when the motorist reaches the intersection, he is required to drive in making a left turn. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

Duty of Driver of Overtaking Vehicle.—Where the uncontroverted evidence supports a finding that the driver of the defendant's car violated § 20-149 (a) as to the duty of the driver of an overtaking vehicle, but there is neither allegation nor evidence that such violation was a proximate cause of the collision, an instruction based on § 20-149 (a) is erroneous and prejudicial. McGinnis v. Robinson, 252 N.C. 574, 114 S.E.2d 365 (1960).

Maximum Speed in Business District.—Where there was no evidence that the scene of an accident was within a business district as defined in § 20-38, a charge as to the maximum speed in a business district was prejudicial error since charge was on an abstract principle of law not supported by any evidence. Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963).

Negligence in Regard to Turn Signals and Excessive Speed.—Where there is no evidence that defendant driver failed to give the signal for a left turn, as required by § 20-154, and no evidence that she was traveling at excessive speed at the time, it is error for the court to instruct the jury upon the issue of the driver's negligence in regard to turn signals and excessive speed. Textile Motor Freight, Inc. v. DuBose, 260 N.C. 497, 133 S.E.2d 129 (1963).

Failure to Instruct as to Duty of Motorist to Avoid Injuring Children.—See Hawkins v. Simpson, 237 N.C. 155, 74 S.E.2d 331 (1953).

Failure to State That Intentional Killing Must Be Shown to Raise Implication of Malice.—See State v. Bright, 237 N.C. 475, 75 S.E.2d 407 (1953).

Necessity of Proving Prerequisite Evidential Fact beyond Reasonable Doubt.—Where proof of a particular evidential fact beyond a reasonable doubt is obviously a prerequisite to the establishment of the defendant's guilt, if the circumstantial evidence in its entirety is deemed sufficient to withstand a defendant's motion for judgment as in case of nonsuit, an application of the law to the facts arising on the evidence as provided in this section requires that the presiding judge instruct the jury that proof of such fact beyond a reasonable doubt is a prerequisite to a verdict of guilty. State v. Chavis, 270 N.C. 306, 154 S.E.2d 340 (1967).

Failure to Define Words "Reasonable" and "Doubt." — Where no request was made to define the term "reasonable doubt," the failure to define the words "reasonable" and "doubt" does no violence to this section. State v. Lee, 248 N.C. 327, 103 S.E.2d 295 (1958); State v. Broome, 268 N.C. 298, 150 S.E.2d 416 (1966).

The failure to define the words "reasonable" and "doubt" does no violence to this section. State v. Bailiff, 2 N.C. App. 608, 163 S.E.2d 398 (1968).

Failure to Instruct on Law Applicable to Evidence Offered in Support of Defense.—See State v. Sherian, 234 N.C. 30, 65 S.E.2d 331 (1951).

In a prosecution for assault, where defendant's evidence tends to show that the shooting was accidental or by misadventure caused by a tussel over the pistol which the prosecuting witness had pointed at him, defendant has a substantial legal right to have the judge declare and explain the law arising on this evidence, and failure of the court to do so is prejudicial error State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

Self-Defense.—Instruction omitting reference to self-defense held prejudicial error See State v. Messimer, 237 N.C. 617, 75 S.E.2d 540, 884 (1953).

Instruction on law of self-defense held not required under evidence. See State v Porter, 238 N.C. 735, 78 S.E.2d 910 (1953).

In a prosecution for murder it was held that it was incumbent upon the trial court, even in the absence of prayer for special instructions, to define a home within the meaning of the law or self-defense and to charge upon defendant's legal right to defend himself in his home, to defend his home from attack and to eject trespassers therefrom, as substantive features of the case arising upon the evidence. State v Poplin, 238 N.C. 728, 78 S.E.2d 777 (1953).

An instruction on self-defense that defendant could use no more force than was reasonably necessary is erroneous, the correct rule being that defendant could use such force as was reasonably or apparently necessary. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

Force Used in Defense of Home—Eviction of Trespassers.—

In accord with original. See State v. Goodson, 235 N.C. 177, 69 S.E.2d 242 (1952).

Rights of Person on Whom Murderous Assault Is Made.—In a murder prosecution, where self-defense is relied upon, the failure of the trial court to instruct the jury in accordance with a settled principle of law, under which are fixed the rights of a person upon whom a murderous assault is made, undoubtedly weighed heavily against the defendant and constituted error State v. Washington, 234 N.C. 531, 67 S.E.2d 498 (1951).

Specific Intent in Robbery.—

Where the evidence relied on by defendant tends to admit the taking but to deny that it was with felonious intent, it is essential that the court fully define the "felonious intent" contended for by the State and also explain defendant's theory as to the intent and purpose of the taking, in order that the jury may understandingly decide between the contentions of the State and defendant on that point. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

Failure to Define "Annoy, Molest and Harass".—The words, "annoy, molest and harass," appearing in § 14-196.1, are in such general usage and so well understood by the average person that it would be a waste of time to define them. Had the defendant thought their definition of sufficient importance to request it, it is quite likely that the court would have defined them, but the failure to make such request waives any possible error. State v. Godwin, 267 N.C. 216, 147 S.E.2d 890 (1966).

Instruction as to "Highway" and "Intersection".—Since the terms "highway" and "intersection" are not technical terms and are commonly understood, if additional instructions as to those terms are desired, a request must be made. Payne v. Lowe, 2 N.C. App. 369, 163 S.E.2d 74 (1968).

Section Complied with.—

See Hodges v. Malone & Co., 235 N.C. 512, 70 S.E.2d 478 (1952); State v. Roman, 235 N.C. 627, 70 S.E.2d 857 (1952); State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953).

Section Not Complied with.—See Childress v. Johnson Motor Lines, 235 N.C. 522, 70 S.E.2d 558 (1952); Spencer v. McDowell Motor Co., 236 N.C. 239, 72 S.E.2d 598 (1952); State v. King, 256 N.C. 236, 123 S.E.2d 486 (1962); Widenhouse v. Yow, 258 N.C. 599, 129 S.E.2d 306 (1963).

§ 1-180.1. Judge not to comment on verdict.—In criminal actions the presiding judge shall make no comment in open court in the presence or hearing of all, or any member or members, of the panel of jurors drawn or summoned for jury duty at any term of court, upon any verdict rendered at such term of court, and if any presiding judge shall make any comment as herein prohibited, or shall praise or criticise any jury on account of its verdict, whether such comment, praise or criticism be made inadvertently or intentionally, such praise, criticism or comment by the judge shall constitute valid grounds as a matter of right, for the continuance for the term of any action remaining to be tried during that week at such term of court, upon motion of a defendant or upon motion of the State. The provisions of this section shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgment. (1955, c. 200; 1967, c. 954, s. 3.)

Cross Reference.—For similar provisions regarding civil actions, see Rule 51 of the Rules of Civil Procedure (§ 1A-1).

Editors Note. — The 1967 amendment added "In criminal actions" at the beginning of the first sentence, and substituted "upon motion of a defendant or upon motion of the State" for "upon motion of any party to any such action, plaintiff or defendant, or upon motion of the solicitor for the State" at the end of such sentence.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

A trial judge in his discretion has the power to discharge a jury from service. State v. Hiatt, 3 N.C. App. 584, 165 S.E.2d 349 (1969).

And He Need Not Do So in Absence of Other Jurors Summoned for Session.—This section does not require the trial judge to exercise his prerogative of discharging a jury from further service in the absence of other jurors summoned for the session. State v. Hiatt, 3 N.C. App. 584, 165 S.E.2d 349 (1969).

§ 1-181. Requests for special instructions.

Cross Reference. — For similar provisions, see Rule 51 of the Rules of Civil Procedure (§ 1A-1).

Section Mandatory.—

Where counsel's request that the judge define "reasonable doubt" was not in writing and was first made after the court had concluded its charge to the jury, whether to comply with the request was a matter resting in the sound discretion of the judge. State v. Broome, 268 N.C. 298, 150 S.E.2d 416 (1966).

Applied in Appliance Buyers Credit Corp. v. Mason, 271 N.C. 427, 156 S.E.2d 689 (1967).

Cited in Wagner v. Eudy, 257 N.C. 199, 125 S.E.2d 598 (1962); Waden v. McGhee, 274 N.C. 174, 161 S.E.2d 542 (1968); Jackson v. Jones, 2 N.C. App. 441, 163 S.E.2d 31 (1968).

§ 1-181.1. View by jury.—The judge presiding at the trial of any action or proceeding involving the exercise of the right of eminent domain, or the condemnation of real property may, in his discretion, permit the jury to view the property which is the subject of condemnation. (1965, c. 138.)

§ 1-182. Instructions in writing; when to be taken to jury room.—The judge, at the request of any party to a criminal action on trial, made at or before the close of the evidence, before instructing the jury on the law must put his instructions in writing and read them to the jury. He shall then sign and file them with the clerk as a part of the record of the action.

When a judge puts his instructions in writing either of his own will or at the request of a party to the action, he must, at the request of either party to the action, allow the jury to take his instructions with them on their retirement, and the jury must return the instructions with their verdict to the court. (C. C. P., s. 238; Code, s. 414; 1885, c. 137; Rev., ss. 536, 537; C. S., s. 566; 1967, c. 954, s. 3.)

Cross Reference.—As to instructions in civil actions, see Rule 51 of the Rules of Civil Procedure (§ 1A-1).

Editor's Note.—

The 1967 amendment inserted "criminal" preceding "action" in the first sentence.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Cited in Wagner v. Eudy, 257 N.C. 199, 125 S.E.2d 598 (1962).

§ 1-183: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References.—As to dismissal of actions, see Rule 41 of the Rules of Civil Procedure (§ 1A-1). As to motion for directed verdict, see Rule 50 of the Rules of Civil Procedure (§ 1A-1).

§ 1-183.1. Effect on counterclaim of nonsuit as to plaintiff's claim.—The granting of a motion by the defendant for judgment of nonsuit as to the plaintiff's cause of action shall not amount to the taking of a voluntary nonsuit on any counterclaim which the defendant was required or permitted to plead pursuant to G. S. 1-137 (1959, c. 77.)

Applied in Williamson v. Varner, 252 N.C. 446, 114 S.E.2d 92 (1960).

§ 1-184: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 39 of the Rules of Civil Procedure (§ 1A-1).

§ 1-185: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to findings of fact and conclusions of law by court, see Rule 52 of the Rules of Civil Procedure (§ 1A-1).

§ 1-186. Exceptions to decision of court.

Sections 1-184 to 1-187 are to be construed in pari materia with § 1-539.3 et seq. Hajoca Corp. v. Brooks, 249 N.C. 10, 105 S.E.2d 123 (1958).

This section applies equally when a jury trial is waived under § 1-539.3 et seq. and when it is waived under § 1-184. Hajoca Corp. v. Brooks, 249 N.C. 10, 105 S.E.2d 123 (1958).

Exceptions Necessary.—

When a trial by jury is waived, in order to preserve for review on appeal an adverse ruling on a motion for judgment as of nonsuit, it is necessary to except to the findings of fact in apt time on the ground that such findings are not supported by the evidence. Exceptions to such findings must be taken within the time allowed by this section. City of Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957).

Since no exceptions were taken to the findings of fact or the conclusions of law, the exception to the refusal to grant the appellant's motion for judgment as of nonsuit presents no question for review with respect to the findings of fact or the conclusions of law. City of Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957).

If one wishes to have the Supreme Court review an affirmance by the superior court of findings by a referee or administrative agency, it is necessary to specifically except to the court's ruling with respect to the fact he wishes to challenge in the time and manner prescribed by this section. Clark Equip. Co. v. Johnson, 261 N.C. 269, 134 S.E.2d 327 (1964).

In a trial by the court under agreement of the parties, mere entry of appeal without the filing of exception to the judgment or to the refusal of the court to find facts as requested until the service of statement on appeal, does not meet the requirements of this section. Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co., 267 N.C. 528, 148 S.E.2d 693 (1966).

Broadside Exception.—An exception "to each conclusion of law embodied in the judgment" is a broadside exception and does not comply with this section and Rules of Practice in the Supreme Court. Jamison v. City of Charlotte, 239 N.C. 682, 80 S.E.2d 904 (1954).

Presumption Where Exceptions Not Taken. – Where no exceptions have been taken to the admission of evidence or to the findings of fact, such findings are presumed to be supported by competent evidence and are binding upon appeal. City of Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957).

Exception to the signing of a judgment presents these questions: (1) Do the facts found support the judgment, and (2) does any error of law appear upon the face of the record? City of Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957).

§ **1-187:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Article 20

Reference.

§ **1-188:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (a), Rule 53 of the Rules of Civil Procedure (§ 1A-1).

§ **1-189:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 53 of the Rules of Civil Procedure (§ 1A-1).

§ **1-190:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 53 of the Rules of Civil Procedure (§ 1A-1).

§§ **1-191 to 1-193:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed sections, see Rule 53 of the Rules of Civil Procedure (§ 1A-1).

§ **1-194:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 53 of the Rules of Civil Procedure (§ 1A-1).

§ **1-195:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 53 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 21.

Issues.

§§ **1-196 to 1-199**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-200**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — For provisions similar to those of the repealed section, see Rule 49 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 22

Verdict and Exceptions.

§ **1-201**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 49 of the Rules of Civil Procedure (§ 1A-1).

§ **1-202. Special controls general.**

Cross Reference. — For similar provisions, see Rule 49 of the Rules of Civil Procedure (§ 1A-1).

§ **1-203**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For present provisions as to general and special verdicts, see Rule 49 of the Rules of Civil Procedure (§ 1A-1).

§§ **1-204, 1-205**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to entry of judgment, see Rule 58 of the Rules of Civil Procedure (§ 1A-1).

§ **1-206**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 46 of the Rules of Civil Procedure (§ 1A-1).

§ **1-207**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to new trials, see Rule 59 of the Rules of Civil Procedure (§ 1A-1).

SUBCHAPTER VIII JUDGMENT

ARTICLE 23

Judgment

§ **1-208**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross reference.—For provisions similar to those of the repealed section, see Rule 54 of the Rules of Civil Procedure (§ 1A-1).

§ **1-209. Judgments authorized to be entered by clerk; sale of property; continuance pending sale; writs of assistance and possession.**—The clerks of the superior courts are authorized to enter the following judgments:

(1) All judgments of voluntary nonsuit.

(2) All consent judgments.

(3) In all actions upon notes, bills, bonds, stated accounts, balances struck, and other evidences of indebtedness within the jurisdiction of the superior court.

(4) All judgments by default final and default and inquiry as are authorized by Rule 55 of the Rules of Civil Procedure, and in this section provided.

(5) In all cases where the clerks of the superior court enter judgment by default final upon any debt secured by mortgage, deed of trust, conditional sale contract or other conveyance of any kind, either real or personal property, or by a pledge of property, the said clerks of the superior court are authorized and empowered to order a foreclosure of such mortgage, deed of trust, conditional sale contract, or other conveyance, and order a sale of the property so conveyed or pledged upon such terms as appear to be just; and the said clerks of the superior court shall have all the power and authority now exercised by the judges of the superior court to appoint commissioners to make such sales, to receive the reports thereof, and to confirm the report of sale or to order a resale, and to that end they are authorized to continue such causes from time to time as may be required to complete the sale, and in the final judgment in said causes they shall order the execution and delivery of all necessary deeds and make all necessary orders disbursing the funds arising from the sale, and may issue writs of assistance and possession upon ten days' notice to parties in possession. The commissioners appointed to make foreclosure sales, as herein authorized, may proceed to advertise such sales immediately after the date of entering judgment and order of foreclosure, unless otherwise provided in said judgment and order.

In any tax foreclosure action pending on March 15, 1939 or thereafter brought under the provisions of § 105-414 in which there is filed no answer which seeks to prevent entry of judgment of sale, the clerk of the superior court may render judgment of sale and make all necessary subsequent orders and judgments to the same extent as permitted by this section in actions brought to foreclose a mortgage. All such judgments and orders heretofore rendered or made by a clerk of the superior court in such tax foreclosure actions are hereby, as to the authority of the said clerk, ratified and confirmed. (1919, c. 156; C. S., s. 593; Ex. Sess. 1921, c. 92, s. 12; 1929, cc. 35, 49; 1939, c. 107; 1943, c. 301, s. 1; 1967, c. 954, s. 3.)

Editor's Note.—

The 1967 amendment substituted "Rule 55 of the Rules of Civil Procedure" for "§§ 1-211, 1-212, 1-213" in subdivision (4).

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

An Enabling Act.—

In accord with 1st paragraph in original. See Rich v. Norfolk S. Ry., 244 N.C. 175, 92 S.E.2d 768 (1956).

Tax Foreclosure Proceedings.—To put at rest any question as to the power of the clerk in tax foreclosure proceedings the 1929 legislature gave clerks of the superior court express authority, except where answer was filed raising issues of fact, to make all orders necessary to consummate the foreclosure. The substance of this statute now appears as the last paragraph of this section. Travis v. Johnston, 244 N.C. 713, 95 S.E.2d 94 (1956).

Default Judgment May Be Entered in Action for Breach of Contract to Pay Sum.—See Freeman v. Hardee's Food Sys., Inc., 267 N.C. 56, 147 S.E.2d 590 (1966).

Judgment of Voluntary Nonsuit.—

A judgment of voluntary nonsuit may be entered before the clerk of superior court at anytime, or before the judge at term. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Judgment Entered without Authority, etc.—

When a clerk of superior court, without

statutory authority, enters a judgment by default final, it is subject to attack by motion in the cause and will be vacated. Freeman v. Hardee's Food Sys., Inc., 267 N.C. 56, 147 S.E.2d 590 (1966).

Where Complaint Does Not Allege Sufficient Facts.—The clerk's judgment by default final should be vacated if the complaint does not allege facts sufficient to constitute a basis therefor. Freeman v. Hardee's Food Sys., Inc., 267 N.C. 56, 147 S.E.2d 590 (1966).

Consent Judgment May Be Set Aside for Fraud, Mistake or Lack of Consent.—Where parties solemnly consent that a certain judgment shall be entered on the record, it cannot be changed or altered or set aside without the consent of the parties to it, unless it appears, upon proper allegation and proof and a finding of the court, that it was obtained by fraud or mutual mistake, or that consent was not in fact given. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

But Entire Judgment Must Be Set Aside.—It is a general rule that in a case where a consent judgment may be set aside for cause, it must be set aside in its entirety. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

The court has the power to set aside a consent judgment, as a whole, but not to eliminate from it that part which affects some of the parties only. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

Lack of Consent Renders Judgment Void.—The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

And Inoperative in Its Entirety.—A consent judgment rendered without the consent of a party will be held inoperative in its entirety. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

And It Will Be Vacated without Showing of Meritorious Defense.—When a purported consent judgment is void for want of consent of one of the parties, such party is not required to show a meritorious defense in order to vacate the void judgment. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

Findings on Consent Supported by Evidence Are Binding.—When a party to an action denies that he gave his consent to the judgment as entered, the proper procedure is by motion in the cause. And when the question is raised, the court, upon motion, will determine the question. The findings of fact made by the trial judge in making such determination, where there is some supporting evidence are final and binding on the Supreme Court. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

Applied in Schlagel v. Schlagel, 253 N.C. 787, 117 S.E.2d 790 (1961).

Cited in Pate v. R.L. Pittman Hosp., 234 N.C. 637, 68 S.E.2d 288 (1951); Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952); Morris v. Wilkins, 241 N.C. 507, 85 S.E.2d 892 (1955); Keith Tractor & Implement Co. v. McLamb, 252 N.C. 760, 114 S.E.2d 668 (1960); Scott v. Scott, 259 N.C. 642, 131 S.E.2d 478 (1963).

§ 1-209.1. Petitioner who abandons condemnation proceeding taxed with fee for respondent's attorney.—In all condemnation proceedings authorized by G. S. 40-2 or by any other statute, the clerks of the superior courts are authorized to fix and tax the petitioner with a reasonable fee for respondent's attorney in cases in which the petitioner takes or submits to a voluntary nonsuit or otherwise abandons the proceeding. (1957, c. 400, s. 1.)

Cited in North Carolina State Highway Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

§ 1-209.2. Voluntary nonsuit by petitioner in condemnation proceeding.—The petitioner in all condemnation proceedings authorized by G. S. 40-2 or by any other statute is authorized and allowed to take a voluntary nonsuit. (1957, c. 400, s. 2.)

Right to Take Nonsuit Recognized Prior to Enactment of Section.—The right of a petitioner in a condemnation proceeding to submit to a voluntary nonsuit, at any time prior to the vesting of title in condemnor, had been judicially recognized prior to the enactment of this section. North Carolina State Highway Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

This section does not permit condemnor to avoid payment of compensation by taking a nonsuit after title to the property has vested in condemnor. North Carolina State Highway Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

§ **1-211**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to judgments by default, see Rule 55 of the Rules of Civil Procedure (§ 1A-1).

§ **1-212**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to judgments by default, see Rule 55 of the Rules of Civil Procedure (§ 1A-1).

§ **1-213**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to judgments by default, see Rule 55 of the Rules of Civil Procedure (§ 1A-1).

§ **1-214**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to judgments by default, see Rule 55 of the Rules of Civil Procedure (§ 1A-1).

§ **1-215**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-217.2. Judgments by default to remove cloud from title to real estate validated.**—In every case where prior to the 1st day of April, 1956, a judgment by default final has been entered by the clerk of the superior court of any county in this State in an action to remove cloud from title to real estate the said judgment is hereby to all intents and purposes validated, and said judgment is hereby declared to be regular, proper and a lawful judgment in all respects according to the provisions of same. (1961, c. 628.)

§§ **1-218, 1-219**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-220**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 60 of the Rules of Civil Procedure (§ 1A-1).

§§ **1-221, 1-222**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§§ **1-224 to 1-226**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-227**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to judgment divesting title of one party and vesting it in others, see Rule 70 of the Rules of Civil Procedure (§ 1A-1).

§ 1-230. In action for recovery of personal property.

Plaintiff May Recover Both Possession of Property and Damages for Its Detention.—In a proceeding for claim and delivery of personal property a plaintiff is entitled in a single action to recover both possession of the property and damages for its detention. Bowen v. King, 146 N.C. 385, 59 S.E. 1044 (1907); Mica Indus., Inc. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

Or after Regaining Possession He May Recover Damages in Another Action. — While plaintiff could have had his damages assessed in a former action of claim and delivery brought by him for the wrongful seizure and detention of his property under an attachment in a suit brought by defendant against another, by virtue of this section, he was not required to take this course, but, after regaining possession could, in another action, recover damages for the injury done thereby. Bowen v. King, 146 N.C. 385, 59 S.E. 1044 (1907).

Measure of Damages When Property Cannot Be Returned. — The measure of damages for the wrongful taking of a tractor-trailer which cannot be returned is the value at the time of taking by the sheriff, with interest. Tillis v. Calvine Cotton Mills, Inc., 251 N.C. 359, 111 S.E.2d 606 (1959).

Cited in Moore v. Humphrey, 247 N.C. 423, 101 S.E.2d 460 (1958); General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 117 S.E.2d 479 (1960).

§ 1-234. Where and how docketed; lien.

I. IN GENERAL.

Liens on Real Estate and Personalty Distinguished.—A judgment creditor acquires a lien on the judgment debtor's real estate by docketing But he acquires no lien on the personalty until there has been a valid levy. Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962).

Stated in Dula v. Parsons, 243 N.C. 32, 89 S.E.2d 797 (1955).

Cited in Reid v. Bristol, 241 N.C. 699, 86 S.E.2d 417 (1955); Page v. Miller, 252 N.C. 23, 113 S.E.2d 52 (1960).

II. CREATION OF LIEN AND PRIORITIES.

A. Sufficiency.

1. Realty.

Strict Compliance with Requirement as to Docketing.—

In accord with original See Norman Lbr. Co. v. United States, 223 F.2d 868 (4th Cir. 1955).

2. Personalty.

No lien attaches to personalty by reason of the docketing of the judgment. Porter v. Citizens Bank of Warrenton, Inc., 251 N.C. 573, 111 S.E.2d 904 (1960).

B. Priorities.

Between Judgments.—

Where several judgments have been docketed against the same debtor subsequent to his acquisition of real property, the liens of such judgments take rank or priority with reference to such property according to the dates when such judgments were respectively docketed. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Between Judgment and Attachment.—Where a judgment has become a lien on property of defendant, before the levy of an attachment on the same property, the judgment creditor will prevail over the attaching creditor. Porter v. Citizens Bank of Warrenton, Inc., 251 N.C. 573, 111 S.E.2d 904 (1960).

A judgment creditor who attached the personalty of his debtor is entitled to priority over a judgment creditor who did not attach such property. Porter v. Citizens Bank of Warrenton, Inc., 251 N.C. 573, 111 S.E.2d 904 (1960).

§ 1-235. Of appellate division docketed in superior court; lien. It is the duty of the appropriate clerk of the appellate division, on application of the party obtaining judgment in one of the courts of that division, directing in whole or in part the payment of money, or affecting the title to real estate, or on the like application of the attorney of record of said party, to certify under his hand and the seal of said court a transcript of the judgment, setting forth the title of the court, the names of the parties thereto, the relief granted, that the judgment was so rendered by said court, the amount and date of the judgment, what part thereof bears interest and from what time; and said clerk shall send such certificate and transcript to the clerk of the superior court of such counties as he is directed; and the clerk of the superior court receiving the certificate and transcript shall docket them in like manner as judgment rolls of the superior court are docketed. And when so docketed, the lien of said judgment is the same in all respects, subject to the same restrictions and qualifications, and the time shall be reckoned as is provided and prescribed in the preceding sections for judgments of the superior court, so far as the same are applicable. The party desiring the certificate and transcript provided for in this section may obtain them at any time after such judgment has been rendered, unless the appellate court otherwise directs. (1881, c. 75, ss. 1, 4; Code, s. 436; Rev., s. 575; C. S., s. 615; 1969, c. 44, s. 2.)

Editor's Note.—

The 1969 amendment substituted "appropriate clerk of the appellate division" for "clerk of the Supreme Court" near the beginning of the section, substituted "one of the courts of that division" for "that court" in the first sentence and substituted "appellate court" for "Supreme Court" in the last sentence.

§ 1-237. Judgments of federal courts docketed; lien on property; recordation; conformity with federal law.

A condemnation judgment in favor of the United States need not be recorded in the county where the land lies, and cross indexed in order to protect its ownership in land that it has acquired. United States v. Norman Lumber Co., 127 F. Supp. 518 (M.D.N.C. 1955).

Whether docketing and cross indexing of federal judgments of condemnation with State court records should be required as a condition of validity as against subsequent purchasers from the condemnee is a matter for Congress, and, so far Congress has not seen fit to take action with regard to the matter. Norman Lumber Co. v. United States, 223 F.2d 868 (4th Cir. 1955).

§ 1-239. Paid to clerk; docket credited; transcript to other counties; notice to attorney for judgment creditor.—(a) The party against whom a judgment for the payment of money is rendered, by any court of record, may pay the whole, or any part thereof, to the clerk of the court in which the same was rendered, at any time thereafter, although no execution has issued on such judgment; and this payment of money is good and available to the party making it, and the clerk shall enter the payment on the judgment docket of the court, and immediately forward a certificate thereof to the clerk of the superior court of each county to whom a transcript of said judgment has been sent, and the clerk of such superior court shall enter the same on the judgment docket of such court and file the original with the judgment roll in the action. Entries of payment or satisfaction on the judgment dockets in the office of the clerk of the superior court, by any person other than the clerk, shall be made in the presence of the clerk or his deputy, who shall witness the same, and when entries of full payment or satisfaction have been made, the clerk or his deputy shall enter upon the judgment index kept by him, opposite and on a line with the names of the parties to the judgment, the words "Paid" or "Satisfied."

(b) Upon receipt of any payment of money upon a judgment, the clerk of superior court shall within seven days after the receipt of such payment give notice thereof to the attorney of record for the party in whose favor the judgment was rendered, or if there is no attorney of record to the party. Any other official of any court who receives payment of money upon a judgment shall give notice in the same manner; provided further, that no such moneys shall be paid by the clerk of the superior court until at least seven days after written notice by mail or in person has been given to the attorney of record in whose favor the judgment was rendered; provided, further, that the attorney of record may waive said notice, and said moneys shall be paid by the clerk of superior court, by signing the judgment docket. (1823, c. 1212, P. R.; R. C., c. 31, s. 127; Code, s. 438; Rev., s. 577; 1911, c. 76; C. S., s. 617; 1967, c. 1067; 1969, c. 18.)

Editor's Note.—The 1967 amendment designated the former provisions of the section as subsection (a) and added subsection (b).

The 1969 amendment added the last proviso in subsection (b).

Clerk Is Agent of Owner of Judgment.—The effect of this section is to make the clerk the statutory agent of the owner of the judgment, and not of the party making the payment. Bowen v. Iowa Nat'l Mut. Ins. Co., 270 N.C. 486, 155 S.E.2d 238 (1967).

The effect of this section is to make the clerk the statutory agent of the owner of a judgment, and it is the clerk's duty to pay money received thereunder to the party entitled thereto. Kendrick v. Cain, 272 N.C. 719, 159 S.E.2d 33 (1968).

There is no duty on the party making payment to require the clerk to make an entry on the judgment docket. Kendrick v. Cain, 272 N.C. 719, 159 S.E.2d 33 (1968).

Liability for Loss.—

The clerk and his surety would be liable to the owner of the judgment for any loss which he might suffer because of the clerk's failure to perform his statutory duty. Kendrick v. Cain, 272 N.C. 719, 159 S.E.2d 33 (1968).

Applied in United States v. Atlantic Coast Line R.R., 237 F.2d 137 (4th Cir. 1956), aff'g 135 F. Supp. 600 (E.D.N.C. 1955).

Stated in McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

Cited in Pittman v. Snedeker, 264 N.C. 55, 140 S.E.2d 740 (1965).

§ **1-240**: Repealed by Session Laws 1967, c. 847, s. 2, effective January 1, 1968.

Cross References. — For present provisions as to contribution, see chapter 1B. As to third-party practice, see Rule 14 of the Rules of Civil Procedure (§ 1A-1).

§ 1-241. Clerk to pay money to party entitled.

The duty to receive carries with it the duty to pay the sums collected to the parties entitled thereto. McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

Applied in United States v. Atlantic Coast Line R.R., 135 F. Supp. 600 (4th Cir. 1955), aff'd in 237 F.2d 137 (E.D.N.C. 1956).

§ 1-242. Credits upon judgments.

Amount Paid Plaintiff on Covenant Not to Sue as Credit.—

In accord with original. See Ramsey v Camp, 254 N.C. 443, 119 S.E.2d 209 (1961)

ARTICLE 24.

Confession of Judgment.

§ **1-247**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 68.1 of the Rules of Civil Procedure (§ 1A-1).

§ **1-248**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 68.1 of the Rules of Civil Procedure (§ 1A-1).

§ **1-249**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 68.1 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 25

Submission of Controversy without Action

§§ **1-250 to 1-252**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Article 26.

Declaratory Judgments

§ 1-253. Courts of record permitted to enter declaratory judgments of rights status and other legal relations.

Cross Reference.—See note to § 118-18

In General.—

In accord with 1st paragraph in original. See Branch Banking & Trust Co v Whitfield, 238 N.C. 69, 76 S.E.2d 334 (1953); Competitor Liaison Bureau of Nascar, Inc. v. Blevins, 242 N.C. 282, 87 S.E.2d 490 (1955).

The Declaratory Judgment Act is designed to provide an expeditious method of procuring a judicial decree construing wills, contracts, and other written instruments and declaring the rights and liabilities of parties thereunder. It is not a vehicle for the nullification of such instruments. Nor is it a substitute or alternate method of contesting the validity of wills. Farthing v. Farthing, 235 N.C. 634, 70 S.E.2d 664 (1952); Bennett v. Attorney General, 245 N.C. 312, 96 S.E.2d 46 (1957).

The purpose of the Declaratory Judgment Act is to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions. Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960).

The Uniform Declaratory Judgment Act does not undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

This article does not authorize the adjudication of mere abstract or theoretical questions. Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

Common Law.—It would appear that declaratory relief was unknown at common law, inasmuch as the common-law conception of courts was that they were a branch of the government created to redress private wrongs and punish the commission of crimes and misdemeanors. The courts took no official interest in the affairs of civil life until one person had wronged another; then the object was to give relief for the injury inflicted. Newman Mach. Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968).

The Declaratory Judgment Act is to be liberally construed and administered. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

The essential distinction between an action for declaratory judgment and the usual action is that no actual wrong need have been committed or loss have occurred in order to sustain the declaratory judgment action, but there must be no uncertainty that the loss will occur or that the asserted right will be invaded. Newman Mach. Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968).

Specific Reference to Statute Not Required.—It is not error if an action instituted under this section fails to make specific reference to the statute in the complaint. It is the facts alleged that determine the nature of the relief to be granted. Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960).

Necessity for a Controversy.—

An action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

While the Uniform Declaratory Judgment Act enables courts to take cognizance of disputes at an earlier stage than that ordinarily permitted by the legal procedure which existed before its enactment, it preserves inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

Actions for a declaratory judgment under the provisions of this section will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. Branch Banking & Trust Co. v. Whitfield, 238 N.C. 69, 76 S.E.2d 334 (1953).

Jurisdiction under this and the sections following may be invoked only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. City of Greensboro v. Wall, 247 N.C. 516, 101 S.E.2d 413 (1958).

When a litigant seeks relief under the declaratory judgment statute, he must set forth in his pleading all facts necessary to disclose the existence of an actual controversy between the parties to the action with regard to their respective rights and duties in the premises. Haley v. Pickelsimer, 261 N.C. 293, 134 S.E.2d 697 (1964).

The superior court has jurisdiction to render a declaratory judgment only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance, or franchise. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

When a complaint alleges a bona fide controversy justiciable under the Declaratory Judgment Act, and it does not appear from the complaint that necessary parties are absent from the suit, a demurrer to the complaint should be overruled. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

Where a complaint in a proceeding for a declaratory judgment stated a justiciable controversy, a demurrer should have been overruled, and after the filing of an answer a decree containing a declaration of right should have been entered. Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966); Walker v. City of Charlotte, 268 N.C. 345, 150 S.E.2d 493 (1966).

This article was not intended to require the court to give advisory opinions when no genuine controversy presently exists between the parties. Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

This section is broad in its terms, but it has been consistently held that under it, the court will not entertain a proceeding which lacks the essentials of an actual controversy. The presence of a genuine controversy is a jurisdictional necessity. Newman Mach. Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968).

To constitute an actual controversy there need not exist an actual right of action in one party against the other in which consequential relief might be granted. But a mere fear or apprehension that a claim may be asserted in the future is not ground for issuing a declaratory judgment; before granting such relief, the court must be convinced that litigation sooner or later appears to be unavoidable. Consequently, where it appears that the facts alleged disclose that either the statute of limitations or the doctrine of laches is applicable thereto, there is no justiciable controversy as contemplated by the Declaratory Judgment Act. Newman Mach. Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968).

Facts held insufficient to present controversy under the Declaratory Judgment Act. Competitor Liaison Bureau of Nascar, Inc. v. Blevins, 242 N.C. 282, 87 S.E.2d 490 (1955).

The test of the sufficiency of a complaint in a declaratory judgment proceeding is not whether the complaint shows that the plaintiff is entitled to the declaration of rights in accordance with his theory, but whether he is entitled to a declaration of rights at all, so that even if the plaintiff is on the wrong side of the controversy, if he states the existence of a controversy which should be settled, he states a cause of suit for a declaratory judgment. Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966); Walker v. City of Charlotte, 268 N.C. 345, 150 S.E.2d 493 (1966).

General Principles Govern Demurrers.—The use and determination of demurrers in declaratory judgment actions are controlled by the same principles that apply in other cases. Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

A demurrer is rarely an appropriate pleading for a defendant to file to a petition for declaratory judgment. Where the plaintiff's pleading sets forth an actual or justiciable controversy, it is not subject to demurrer since it sets forth a cause of action, even though the plaintiff may not be entitled to a favorable declaration on the facts stated in his complaint; that is, in passing on the demurrer, the court is not concerned with the question whether plaintiff is right in a controversy, but only with whether he is entitled to a declaration of rights with respect tc the matters alleged. Walker v. City of Charlotte, 268 N.C. 345, 150 S.E.2d 493 (1966); Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

The general rule is that where plaintiff's pleading, in an action for a declaratory judgment, sets forth an actual or justiciable controversy, or a bona fide justiciable controversy, it is not subject to demurrer, since it sets forth a cause of action. This is true even though plaintiff is not entitled to a favorable declaration on the facts stated in his complaint, or to any relief, or is wrong in his contention as to his ultimate rights, since, in passing on the demurrer, the court is not concerned with whether he is entitled to a declaration of rights with respect to the matters alleged. Walker v. City of Charlotte, 268 N.C. 345, 150 S.E.2d 493 (1966).

When a complaint alleges a bona fide controversy justiciable under the Declaratory Judgment Act, and it does not appear from the complaint that necessary parties are absent from the suit, a demurrer to the complaint should be overruled. The parties are entitled to a declaration of their rights and liabilities and the action should be disposed of only by a judgment declaring them. Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

Only civil rights, status, etc.—
An action is maintainable under the Declaratory Judgment Act only in so far as it affects the civil rights, status and other relations in the present actual controversy between parties. Chadwick v. Salter, 254 N.C. 389, 119 S.E.2d 158 (1961).

Immunity of State Not Waived.—The State has not waived its immunity against suit by one of its citizens under the Declaratory Judgment Act to adjudicate his tax liability under the sales tax statute. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

Hence, the Commissioner of Revenue cannot be sued pursuant to the provisions of the Declaratory Judgment Act. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

In an action under this section to construe an easement granted by the State, judgment may not be entered enjoining the State and its employees from interfering with an easement as defined by the court, since no action, except as provided in § 143-291, may be maintained against the State or any agency thereof in tort or to restrain the commission of a tort. Shingleton v. State, 260 N.C. 451, 133 S.E.2d 183 (1963).

Article Does Not Supersede Rule That State Cannot Be Delayed in Collection of Revenue.—As broad and comprehensive as it is, this article does not supersede the rule that the sovereign may not be denied or delayed in the enforcement of its right to collect the revenue upon which its existence depends. Bragg Dev. Co. v. Braxton, 239 N.C. 427, 79 S.E.2d 918 (1954).

Article Does Not Vest in Superior Court Power to Supervise Officials of Inferior Courts. — While the Declaratory Judgment Act is comprehensive in scope and purpose, the legislature, in enacting it did not intend to vest in the superior courts of the State the general power to oversee, supervise, direct, or instruct officials of inferior courts in the discharge of their official duties. Town of Fuquay Springs v. Rowland, 239 N.C. 299, 79 S.E.2d 774 (1954); City of Henderson v. County of Vance, 260 N.C. 529, 133 S.E.2d 201 (1963).

Failure of Clerk of Local Court to Collect and Account for Moneys.—The failure of a clerk of a local court to collect and account for moneys rightfully belonging to a municipality because of alleged error in the taxing of costs in criminal prosecutions in his court may not be made the subject of an action instituted under the Declaratory Judgment Act. Town of Fuquay Springs v. Rowland, 239 N.C. 299, 79 S.E.2d 774 (1954).

A moot question is not within the scope of the Declaratory Judgment Act. Morris v. Morris, 245 N.C. 30, 95 S.E.2d 110 (1956).

A proceeding under the Declaratory Judgment Act for a declaration as to how the estate of deceased passed by his purported will must be dismissed when the record of probate of the instrument discloses on its face that the paper writing had not been proven as required by statute, since in such instance the question of title to property under the paper writing is moot. Morris v. Morris, 245 N.C. 30, 95 S.E.2d 110 (1956).

The validity of a statute, when directly and necessarily involved, may be determined in a properly constituted action under this and sections following; but this may be done only when some specific provision thereof is challenged by a person who is directly and adversely affected thereby. City of Greensboro v. Wall, 247 N.C. 516, 101 S.E.2d 413 (1958); Angell v.

City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

Under the broad terms of the Declaratory Judgment Act there was held to be a right to challenge the Firemen's Pension Fund Act, § 118-18 et seq., in the superior court. It did not appear that the instant case was an action against the State and the allegations were sufficient to show the court had jurisdiction of the cause. American Equitable Assurance Co. v. Gold, 248 N.C. 288, 103 S.E.2d 344 (1958).

The Declaratory Judgment Act does not authorize an action to determine the validity of a taxing statute in lieu of, or in substitution for, the specific statutory procedure provided for that purpose. Great Am. Ins. Co. v. Gold, 254 N.C. 168, 118 S.E.2d 792 (1961).

A declaratory judgment may be entered only after answer and on such evidence as the parties may introduce upon the trial or hearing, in the absence of a stipulation. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

Question of Insurer's Liability.—

Generally questions involving the liability of insurance companies under their policies are proper subjects for declaratory relief. Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc., 258 N.C. 69, 128 S.E.2d 19 (1962); Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

Where a declaratory judgment action served the dual purpose of determining with finality an insurance company's obligation to defend the insured in a tort action pending against the insured and the company's ultimate liability for any judgment rendered against the insured the case was a perfect one for declaratory judgment. Stout v. Grain Dealers Mut. Ins. Co., 307 F.2d 521 (4th Cir. 1962).

Action to Determine Right to Easement.—

An action to obtain a judicial declaration of plaintiff's right to an easement appurtenant over the lands of defendants is authorized by the Declaratory Judgment Act. Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

A controversy between an individual and the State as to the extent of an easement granted to the individual by the State may be made the basis of a suit against the State in the superior court under this section, since such suit involves title to realty within the purview of § 41-10.1. Shingleton v. State, 260 N.C. 451, 133 S.E.2d 183 (1963); Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

Jurisdiction of Industrial Commission Exclusive in Workmen's Compensation Cases.—In an action instituted in the superior court under the Declaratory Judgment Act or otherwise, when the pleadings disclose an employee-employer relationship exists so as to make the parties subject to the provisions of the Workmen's Compensation Act, dismissal is proper for the Industrial Commission has exclusive jurisdiction in such cases. Cox v. Pitt County Transp. Co., 259 N.C. 38, 129 S.E.2d 589 (1963).

Such as One Involving Right of Insurance Carrier to Subrogation.—The Declaratory Judgment Act may not be used to determine whether or not the employer's insurance carrier is entitled to the right of subrogation against the funds received from the third party tort-feasor, under the provisions of § 97-10.2, since the Industrial Commission has the exclusive original jurisdiction to determine the question. Cox v. Pitt County Transp. Co., 259 N.C. 38, 129 S.E.2d 589 (1963).

Question as to Right of Adopted Children to Share in Corpus of Trust.—Where, in an action to construe a will, the parties sought adjudication as to whether the three adopted children of testator's nephew would be entitled to share in the corpus of a trust after the death of the life beneficiaries, it was held that since the question was one of law and presently determinable, and since it was not moot unless all three adopted children should die prior to the death of the survivor of the life beneficiaries, the parties were entitled to a determination of the question. Wachovia Bank & Trust Co. v. Green, 238 N.C. 339, 78 S.E.2d 174 (1953).

Right to Close Alleyway.—Where an alleyway ending in a cul-de-sac was referred to in the respective deeds to contiguous lots, the right to close a part of the alley at the cul-de-sac end could be determined under the Declaratory Judgment Act. Hine v. Blumenthal, 239 N.C. 537, 80 S.E.2d 458 (1954); Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

A controversy as to whether deeds created a fee upon special limitation and as to whether title would revert to grantors upon the threatened happening of the contingency, may be maintained under the Declaratory Judgment Act. Charlotte Park & Recreation Comm'n v. Barringer, 242 N.C. 311, 88 S.E.2d 114 (1955); Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

The mere threat of an action to rescind

a sale of personal property, or to sue for damages, is not sufficient to constitute such an actual controversy as is cognizable under the Uniform Declaratory Judgment Act. Newman Mach. Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968).

Action to Quiet Title.—A declaratory action is an appropriate remedy to perform the function of the customary action to quiet title. York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

Applied in Blue Ridge Mem. Park v. Union Nat'l Bank, Inc., 237 N.C. 547, 75 S.E.2d 617 (1953); Bradford v. Johnson, 237 N.C. 572, 75 S.E.2d 632 (1953); City of Greensboro v. Smith, 239 N.C. 138, 79 S.E.2d 486 (1954); Fuller v. Hedgpeth, 239 N.C. 370, 80 S.E.2d 18 (1954); Hubbard v. Wiggins, 240 N.C. 197, 81 S.E.2d 630 (1954); Julian v. Lawton, 240 N.C. 436, 82 S.E.2d 210 (1954); Mesimore v. Palmer, 245 N.C. 488, 96 S.E.2d 356 (1957); Finch v. Honeycutt, 246 N.C. 91, 97 S.E.2d 478 (1957); Wachovia Bank & Trust Co. v. Taliaferro, 246 N.C. 121, 97 S.E.2d 776 (1957); Walker v. Moss, 246 N.C. 196, 97 S.E.2d 836 (1957); Carter v. Davis, 246 N.C. 191, 97 S.E.2d 838 (1957); Reed v. Elmore, 246 N.C. 221, 98 S.E.2d 360 (1957); Competitor Liaison Bureau of Nascar, Inc. v. Midkiff, 246 N.C. 409, 98 S.E.2d 468 (1957); Edmondson v. Henderson, 246 N.C. 634, 99 S.E.2d 869 (1957); Bullock v. Bullock, 251 N.C. 559, 111 S.E.2d 837 (1960); Parker v. Parker, 252 N.C. 399, 113 S.E.2d 899 (1960); Lanier v. Dawes, 255 N.C. 458, 121 S.E.2d 857 (1961); Eastern Carolina Tastee-Freez, Inc. v. City of Raleigh, 256 N.C. 208, 123 S.E.2d 632 (1962); Cline v. Olson, 257 N.C. 110, 125 S.E.2d 320 (1962); Poindexter v. Wachovia Bank & Trust Co., 258 N.C. 371, 128 S.E.2d 867 (1963); Thomas v. Thomas, 258 N.C. 590, 129 S.E.2d 239 (1963); Worsley v. Worsley, 260 N.C. 259, 132 S.E.2d 579 (1963); Tolson v. Young, 260 N.C. 506, 133 S.E.2d 135 (1963); Joyce v. Joyce, 260 N.C. 757, 133 S.E.2d 675 (1963); Clark v. Meyland, 261 N.C. 140, 134 S.E.2d 168 (1964); Adams v. Adams, 261 N.C. 342, 134 S.E.2d 633 (1964); Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc., 262 NC. 691, 138 S.E.2d 512 (1964); Walker v. City of Charlotte, 262 N.C. 697, 138 S.E.2d 501 (1964); First Union Nat'l Bank v. Broyhill, 263 N.C. 189, 139 S.E.2d 214 (1964); Central Carolina Bank & Trust Co. v. Bass, 265 N.C. 218, 143 S.E.2d 689 (1965); Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967); Grant v. Banks, 270 N.C. 473, 155 S.E.2d 87 (1967); Breece v. Breece, 270 N.C. 605, 155 S.E.2d 65 (1967); Gaskill v. Costlow, 270 N.C. 686, 155 S.E.2d 148 (1967); Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967); Harrelson v. City of Fayetteville, 271 N.C. 87, 155 S.E.2d 749 (1967); Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967); Sigmund Sternberger Foundation v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968); City of Raleigh v. Norfolk S. Ry., 4 N.C. App. 1, 165 S.E.2d 745 (1969).

Quoted in Walters v. Baptist Children's Home of N.C., Inc., 251 N.C. 369, 111 S.E.2d 707 (1959); Gregory v. Godfrey, 254 N.C. 215, 118 S.E.2d 538 (1961).

Cited in Efird v. Efird, 234 N.C. 607, 68 S.E.2d 279 (1951); North Carolina State Ports Authority v. First-Citizens Bank & Trust Co., 242 N.C. 416, 88 S.E.2d 109 (1955); Taylor v. Taylor, 243 N.C. 726, 92 S.E.2d 136 (1956); Blanchard v. Ward, 244 N.C. 142, 92 S.E.2d 776 (1956); Price v. Davis, 244 N.C. 229, 93 S.E.2d 93 (1956); Town of Farmville v. A.C. Monk & Co., 250 N.C. 171, 108 S.E.2d 479 (1959); Dickey v. Herbin, 250 N.C. 321, 108 S.E.2d 632 (1959); Brown v. Byrd, 252 N.C. 454, 113 S.E.2d 804 (1960); Andrews v. Andrews, 253 N.C. 139, 116 S.E.2d 436 (1960); Seaford v. Nationwide Mut. Ins. Co., 253 N.C. 719, 117 S.E.2d 733 (1961); Employers' Fire Ins. Co. v. British Am. Assurance Co., 259 N.C. 485, 131 S.E.2d 36 (1963); Tilley v. Tilley, 268 N.C. 630, 151 S.E.2d 592 (1966); Atlantic Disct. Corp. v. Mangel's of N.C., Inc., 2 N.C. App. 472, 163 S.E.2d 295 (1968); Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

§ 1-254. Courts given power of construction of all instruments

Contracts.—When jurisdiction exists, a contract may be construed either before or after there has been a breach of it. Nationwide Mut Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

Statutes. — The Uniform Declaratory Judgment Act furnishes a particularly appropriate method for the determination of controversies relative to the construction and validity of a statute, provided there is an actual or justiciable controversy between the parties in respect to their rights under the statute. Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

A petition for a declaratory judgment is particularly appropriate to determine the constitutionality of a statute when the parties' desire and the public need requires a speedy determination of important public interests involved therein. Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

Release of Prospective Testamentary Benefit.—Where the heart of a case was the determination of the effect meaning and validity of a release of a testamentary benefit from a prospective testator and the rights of the parties thereunder, there was a real controversy which plaintiffs were entitled to have determined. Stewart v. McDade, 256 N.C. 630, 124 S.E.2d 822 (1962).

Applied in North Carolina State Art Soc'y v. Bridges, 235 N.C. 125, 69 S.E.2d 1 (1952); Walters v. Baptist Children's Home of N.C., Inc., 251 N.C. 369, 111 S.E.2d 707 (1959); Great Am. Ins. Co. v. Gold, 254 N.C. 168, 118 S.E.2d 792 (1961); Gregory v. Godfrey, 254 N.C. 215, 118 S.E.2d 538 (1961).

Quoted in Hine v. Blumenthal, 239 N.C. 537, 80 S.E.2d 458 (1954); Bennett v. Attorney General, 245 N.C. 312, 96 S.E.2d 46 (1957); American Equitable Assurance Co. v. Gold, 248 N.C. 288, 103 S.E.2d 344 (1958); Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960).

Stated in York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

Cited in Citizens Nat'l Bank v. Phillips, 235 N.C. 494, 70 S.E.2d 509 (1952).

§ 1-255. Who may apply for a declaration.

Applied in Cunningham v. Brigman, 263 N.C. 208, 139 S.E.2d 353 (1964).

Quoted in Dickey v. Herbin, 250 N.C. 321, 108 S.E.2d 632 (1959); Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960).

§ 1-256. Enumeration of declarations not exclusive.

Quoted in Hine v. Blumenthal, 239 N.C. 537, 80 S.E.2d 458 (1954).

§ 1-257. Discretion of court.

Applied in NAACP v. Eure, 245 N.C. 331, 95 S.E.2d 893 (1957).

§ 1-258. Review.

This section does not enlarge the right of an executor for a review, but provides for review under the same rules that apply in cases not brought pursuant to the Declaratory Judgment Act. Dickey v. Herbin, 250 N.C. 321, 108 S.E.2d 632 (1959).

§ 1-260 Parties

Language of section is clear and specific. McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

Absence of Necessary Party.—The latter portion of the first sentence of this section ordinarily should not be relied on by the courts as authority to proceed to judgment without the presence of all necessary parties, when in the course of a trial the absence of such parties becomes apparent. Morganton v. Hutton & Bourbonnais Co., 247 N.C. 666, 101 S.E.2d 679 (1958).

Where it appears in a case involving the construction of a will that the absence of a necessary party prevents the entry of a judgment finally settling and determining the question of interpretation, the court should refuse to deal with the merits of the case until the absent person is brought in as a party to the action. Edmondson v. Henderson, 246 N.C. 634, 99 S.E.2d 869 (1957).

Parties to Action to Determine Right to Close Alleyway.—The owners of the fee in an alleyway in which owners of contiguous lots had an easement were necessary parties in an action under the Declaratory Judgment Act to determine whether a part of the alleyway at the cul de sac end might be closed, as against the contention of one lot owner that he had the right to have the entire alleyway kept open. But a lot owner who had leased her entire interest, and a party agreeing to lease the alleyway only in the event a part of it could be closed, were not necessary parties to the proceeding. Hine v. Blumenthal, 239 N.C. 537, 80 S.E.2d 458 (1954).

Applied in Marsden v. Southern Flight Serv., Inc., 192 F. Supp. 418 (M.D.N.C. 1961); Pitt & Greene Elec. Membership Corp. v. Carolina Power & Light Co., 261 N.C. 716, 136 S.E.2d 124 (1964); North Carolina Tpk. Authority v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965).

Cited in Dickey v. Herbin, 250 N.C. 321, 108 S.E.2d 632 (1959); Chadwick v. Salter, 254 N.C. 389, 119 S.E.2d 158 (1961).

§ 1-261. Jury trial.

Applied in Iowa Mut Ins Co. v. Fred M. Simmons, Inc., 258 N.C. 69, 128 S.E.2d 19 (1962).

Stated in Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968); York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

Cited in Stout v. Grain Dealers Mut. Ins. Co., 201 F. Supp. 647 (M.D.N.C.), aff'd, 307 F.2d 521 (4th Cir. 1962).

§ 1-262. Hearing before judge where no issues of fact raised or jury trial waived; what judge may hear.

When Court Should Not Consider Evidence and Find Additional Facts.—In an action under the Declaratory Judgment Act when the pleadings do not raise issues of fact, the court is without authority to consider evidence and find additional facts. Thus where the facts were established by defendant's unequivocal admission of all of plaintiffs' factual allegations, the court should not have considered affidavits offered by plaintiffs, and the findings of fact incorporated in the judgment, to the extent that they differed from or went beyond the facts established by the pleadings, would not be considered on appeal. City of Greensboro v. Wall, 247 N.C. 516, 101 S.E.2d 413 (1958).

Applied in Breece v. Breece, 270 N.C. 605, 155 S.E.2d 65 (1967).

Cited in North Carolina State Ports Authority v. First-Citizens Bank & Trust Co., 242 N.C. 416, 88 S.E.2d 109 (1955); Stout v. Grain Dealers Mut. Ins. Co., 201 F. Supp. 647 (M.D.N.C.), aff'd, 307 F.2d 521 (4th Cir. 1962).

§ 1-263. Costs.

Applied in Board of Managers v. City of Wilmington, 237 N.C. 179, 74 S.E.2d 749 (1953).

§ 1-264. Liberal construction and administration.

Applied in Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

Quoted in American Equitable Assurance Co. v. Gold, 248 N.C. 288, 103 S.E.2d 344 (1958).

§ 1-265. Word "person" construed.

Allegations taken as true for purpose of testing demurrer qualified plaintiff insurance companies as "persons" within meaning of this section. American Equitable Assurance Co. v. Gold, 248 N.C. 288, 103 S.E.2d 344 (1958).

§ 1-267. Short title.

Cited in Atlantic Disct., Corp. v. Mangel's of N.C., Inc., 2 N.C. App. 472, 163 S.E.2d 295 (1968).

SUBCHAPTER IX. APPEAL.

Article 27

Appeal.

§ 1-268. Writs of error abolished.

To obtain relief from an irregular judgment, that is, one entered contrary in some material respect to the course of practice and procedure allowed and permitted by law, and not a mere erroneous interpretation of the law, the injured party should proceed by motion in the original cause. Menzel v. Menzel, 250 N.C. 649, 110 S.E.2d 333 (1959).

Or Mistaken Interpretation of Law.—To obtain relief from a mistaken interpretation of the law resulting in an erroneous judgment, the complaining party has his remedy by appeal or proceedings equivalent thereto taken in due time. Menzel v. Menzel, 250 N.C. 649, 110 S.E.2d 333 (1959).

§ 1-269. Certiorari, recordari and supersedeas.

II. CERTIORARI.

B. General Consideration.

Substitute for Appeal.—

In accord with 3rd paragraph in original See In re Burris 261 N.C. 450, 135 S.E.2d 27 (1964)

Effect of Certiorari.—

When issued, the writ of certiorari suspends the authority of the lower court in a case pending the action of the reviewing court. Wheeler v Thabit, 261 N.C. 479 135 S.E.2d 10 (1964)

Applied in Baker v. Varser, 240 N.C. 260, 82 S.E.2d 90 (1954).

Cited in Baker v. Varser, 239 N.C. 180, 79 S.E.2d 757 (1954); Menzel v. Menzel, 250 N.C. 649, 110 S.E.2d 333 (1959); In re McCoy, 233 F. Supp. 409 (E.D.N.C. 1964).

C. Illustrative Cases.

Noncompliance with Rules Governing Appeals. — Where plaintiff, appearing in propria persona because of an asserted inability to employ counsel, fails to comply with the rules of court governing appeals, the Supreme Court, in the exercise of its supervisory jurisdiction may treat the purported appeal as a petition for certiorari. Huffman v. Douglass Aircraft Co., 260 N.C. 308 132 S.E.2d 614 (1963)

Removal of Public Officer or Employee.—If the act of removal of a public officer is executive it is not reviewable on certiorari but if it is on hearing and formal findings, it is reviewable. Stated in another way, the writ may be invoked only to review acts which are clearly judicial or quasi-judicial. Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 375 (1967).

When a governmental agency has power to remove a public officer only for cause after hearing, the ouster proceeding is judicial or quasi-judicial in nature, and may be reviewed by certiorari. Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 367 (1967).

A hearing, pursuant to the provisions of the act creating the civil service board of a city, with respect to the discharge of a classified employee of the city by the civil service board, was held a quasi-judicial function and reviewable upon a writ of certiorari issued from the superior court. In re Burris, 261 N.C. 450, 135 S.E.2d 27 (1964); Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 375 (1967).

An order entered by the civil service board of a city, dismissing a policeman from the police department, was properly brought up for the superior court's review by writ of certiorari. Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 375 (1967).

Demotion of Policeman.—The order entered by a chief of police demoting a policeman from captain of detectives to patrolman was the administrative act of the chief of police and neither judicial nor quasi-judicial in its nature, hence the order was not reviewable by the superior court on certiorari. Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 375 (1967).

III. RECORDARI.

A. Editor's Note.

For comment on the present and future use of the writ of recordari in North Carolina, see 2 Wake Forest Intra. L. Rev. 77 (1966).

As to form for writ of recordari, see 2 Wake Forest Intra. L. Rev. 88 (1966).

IV. SUPERSEDEAS.

Definition and Scope of Writ.—

In accord with 1st paragraph in original. See City of New Bern v. Walker, 255 N.C. 355, 121 S.E.2d 544 (1961).

§ 1-270. Appeal to appellate division; security on appeal; stay. — Cases shall be taken to the appellate division by appeal, as provided by law. All provisions in this article as to the security to be given upon appeals and as to the stay of proceedings apply to appeals taken to the appellate division. (C. C. P., s. 312; Code, ss. 561, 946; Rev., ss. 595, 1540; C. S., s. 631; 1969, c. 44, s. 3.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" in both the first and second sentences.

Cited in State ex rel. Utilities Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951) (con. op.); Richardson v. Cooke, 238 N.C. 449, 78 S.E.2d 208 (1953).

§ 1-271. Who may appeal. — Any party aggrieved may appeal in the cases prescribed in this chapter. A party who cross assigns error in the grant or denial of a motion under the Rules of Civil Procedure is a party aggrieved. (C. C. P., s. 298; Code, s. 547; Rev., s. 585; C. S., s. 632; 1969, c. 895, s. 15.)

Editor's Note. — The 1969 amendment added the second sentence.

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

The Rules of Civil Procedure are found in § 1A-1.

Appeals lie from the superior court to the Supreme Court as a matter of right rather than as a matter of grace. Harrell v Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

And Only the "Aggrieved" May Appeal.—

In accord with 1st paragraph in original. See Langley v. Gore, 242 N.C. 302, 87 S.E.2d 519 (1955); Dickey v. Herbin, 250 N.C. 321, 108 S.E.2d 632 (1959); Waldron Buick Co. v. General Motors Corp., 251 N.C. 201, 110 S.E.2d 870 (1959); State ex rel. Utilities Comm'n v. Maybelle Transp. Co., 252 N.C. 776, 114 S.E.2d 768 (1960); Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963).

Where a party is not aggrieved by the judicial order entered, his appeal will be dismissed. Gaskins v. Blount Fertilizer Co., 260 N.C. 191 132 S.E.2d 345 (1963).

Where both plaintiffs and defendants appeal from judgment in favor of defendants, defendants appeal will not be considered when no error is found on plaintiffs' appeal since in such instance defendants are not the parties aggrieved by the judgment. Teague v. Duke Power Co., 258 N.C. 759, 129 S.E.2d 507 (1963).

Where order was issued that funds in the custody of the court be turned over to plaintiffs, defendants appealed therefrom on the ground that plaintiffs were not entitled to the funds; but defendants had no interest in or claim to the funds. It was held that defendants were not the parties aggrieved within the meaning of this section. Langley v. Gore, 242 N.C. 302, 87 S.E.2d 519 (1955).

"Party Aggrieved" Defined.—

The party aggrieved, within the meaning of this section, is the one whose rights have been directly and injuriously affected by the judgment entered in the superior court. State ex rel. Utilities Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951) (con. op.); Waldron Buick Co. v. General Motors Corp., 251 N.C. 201, 110 S.E.2d 870 (1959).

For a party to be aggrieved, he must have rights which were substantially affected by a judicial order. Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963).

A party is aggrieved if his rights are substantially affected by judicial order Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967).

If the judicial order complained of does not adversely affect the substantial rights of appellant, the appeal will be dismissed. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967).

For various definitions of the words "party aggrieved," see In re Applications for Reassignment, 247 N.C. 413, 101 S.E.2d 359 (1958).

Refusal to Set Aside Verdict.—Where the trial court enters judgment that plaintiff recover nothing of certain defendants, such defendants may not upon plaintiff's appeal from the refusal of the court to enter judgment on the verdict, appeal from the court's refusal to set aside the verdict for errors committed during the trial, since, until a judgment is entered against them, they are not parties aggrieved. Bethea v. Town of Kenly, 261 N.C. 730, 136 S.E.2d 38 (1964).

Interlocutory Order Affecting No Substantial Right.—An appeal from an order requiring the resident father to have the child in court in order that the question of custody might be considered and determined in a habeas corpus proceeding between the parents of the child, separated, but not divorced, is premature and will be dismissed, since the order is interlocutory and affects no substantial right. In re Fitzgerald, 242 N.C. 732, 89 S.E.2d 462 (1955).

Instruction on Negligence of Codefendant.—In an action against each of two defendants as joint tort-feasors, one defendant cannot be the party aggrieved by error in the court's instruction to the jury as to the negligence of the other defendant, where they were not adversaries inter se. Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967).

Trustor under Senior Deed of Trust.—Where a trustor's equity has been divested by foreclosure of a junior deed of trust on the property, he has no rights in the property, and is not a party aggrieved by an order dissolving an injunction against foreclosure of the senior deed of trust. Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963).

Parties Enjoined from Cutting Timber.—Where plaintiffs were estopped to assert title to land in controversy, an order enjoining them from cutting timber which they did not own did not affect any substantial right of theirs; hence, plaintiffs were not parties aggrieved. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963).

Corporation.—Where an action is entitled named individuals "t/a" a named corporation, the corporation cannot be the party aggrieved by an order striking the names of the individuals and the letters "t/a" from the captions of the summons and complaint and the references to said individuals from the complaint. Williams v. Denning, 260 N.C. 540, 133 S.E.2d 148 (1963).

The holder of the legal title as security for a debt has no right to demand possession or foreclose the instrument until requested to do so by a party secured, and therefore the trustee, in the absence of a showing of such request, is not the party aggrieved by, and may not appeal from, a judgment declaring that under § 45-37(5) the right to possession and the right to foreclose were barred. Gregg v Williamson, 246 N.C. 356, 98 S.E.2d 481 (1957).

Applied in Queen City Coach Co. v. Carolina Coach Co., 237 N.C. 697, 76 S.E.2d 47 (1953); State ex rel. Gold v. Equity Gen. Ins. Co., 255 N.C. 145, 120 S.E.2d 452 (1961); Lucas v. Felder, 261 N.C. 169, 134 S.E.2d 154 (1964); Marlin v. Moss, 261 N.C. 737, 136 S.E.2d 90 (1964).

Cited in State ex rel. Utilities Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951); Bell v. Smith, 263 N.C. 814, 140 S.E.2d 542 (1965).

§ 1-272. Appeal from clerk to judge.

Construed in Pari Materia with § 1-276.—As this section and § 1-276 deal with the same subject matter, they must be construed in pari materia and harmonized to give effect to each. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

Appeal Necessary for Jurisdiction of Court.—The superior court does not acquire jurisdiction of a special proceeding before the clerk when there is no appeal from the order of the clerk by a party aggrieved. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

It is sometimes said that, upon an appeal from an order of the clerk made in the performance of his duties as judge of probate, the jurisdiction of the judge of the superior court is derivative. Such derivative jurisdiction is construed to mean, inter alia (1) that the clerk of the superior court has the sole power in the first instance to determine whether a decedent died testate or intestate, and, if he died testate, whether the paper writing offered for probate is his will; (2) that proceedings to repeal letters of administration must be commenced before the clerk who issued them in the first instance; and (3) that the judge of the superior court has no jurisdiction to appoint or remove an administrator or a guardian. In other words, jurisdiction in probate matters cannot be exercised by the judge of the superior court except upon appeal. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Hearing De Novo.—Where the clerk removes an administratrix upon his finding that she was not the widow of the deceased and therefore was not entitled to appointment as a matter of right, and an appeal is taken to the superior court from such order, the superior court, even though its jurisdiction is derivative, hears the matter de novo, and may review the finding of the clerk provided the appellant has properly challenged the finding by specific exception, and may hear evidence and even submit the controverted fact to the jury; but where there is no exception to the finding, the superior court may determine only whether the finding is supported by competent evidence, and if the order is so supported the superior court is without authority to vacate the clerk's judgment and order a jury trial upon the issue. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Findings of Fact May Be Reviewed.—To say that the superior court has jurisdiction to hear a probate matter only upon an appeal from a final judgment entered below does not mean that the judge can review the record only to ascertain whether there have been errors of law. He also reviews any findings of fact which the appellant has properly challenged by specific exceptions. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Applied in Harris v. Harris, 257 N.C. 416, 126 S.E.2d 83 (1962).

Stated in North Carolina State Highway & Pub. Works Comm'n v. Mullican, 243 N.C. 68, 89 S.E.2d 738 (1955).

Cited in In re Hardin, 248 N.C. 66, 102 S.E.2d 420 (1958); In re Estate of Nixon, 2 N.C. App. 422, 163 S.E.2d 274 (1968).

§ 1-273. Clerk to transfer issues of fact to civil issue docket.

Special Proceedings.—

If issues of fact are raised in special proceedings before the clerk, the cause is transferred to the civil issue docket, to be tried as in an ordinary civil action. In the Matter of Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

Probate Proceedings.—A clerk of the superior court may probate a will in solemn form, without the verdict of a jury, that is per testes, where interested parties are cited to appear and "see proceedings," or they come in voluntarily to "see proceedings," and such parties raise no issue of fact. But, where an interested party intervenes in such proceeding and objects to the probate of the will, denying its validity, whether he files a formal caveat or not, it will raise the issue of devisavit vel non, which issue must be tried by a jury. Such procedure is required by this section. In re Will of Ellis, 235 N.C. 27, 69 S.E.2d 25 (1952).

Cited in Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952); In re Will of Wood, 240 N.C. 134, 81 S.E.2d 127 (1954).

§ 1-276. Judge determines entire controversy; may recommit.

Construed in Pari Materia with § 1-272.—As this section and § 1-272 deal with the same subject matter they must be construed in pari materia and harmonized to give effect to each. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

Jurisdiction.—Whenever a special proceeding begun before the clerk is, for any ground whatever sent to the superior court before the judge the judge has jurisdiction. Hudson v. Fox, 257 N.C. 789, 127 S.E.2d 556 (1962).

Even when the proceeding originally had before the clerk is void for want of jurisdiction, the superior court may yet proceed in the matter. Hudson v. Fox, 257 N.C. 789, 127 S.E.2d 556 (1962).

The superior court does not acquire jurisdiction of a special proceeding before the clerk when there is no appeal from the order of the clerk by a party aggrieved. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

Judge May Determine Entire Controversy.—

In accord with 1st paragraph in original. See Sale v. State Highway & Pub. Works Comm'n, 242 N.C. 612, 89 S.E.2d 290 (1955).

In accord with 2nd paragraph in original. See Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

When a civil action or special proceeding instituted before the clerk is "for any ground whatever sent to the superior court before the judge," he has the authority to consider and determine the matter as if originally before him. Langley v. Langley, 236 N.C. 184, 72 S.E.2d 235 (1952).

Under the statutes governing probate matters, the superior court, as a mere court of law and equity, has no jurisdiction to determine an issue whether a disputed writing is the last will of a deceased person in an ordinary civil action. However, when an issue of devisavit vel non is raised, that necessitates the transfer of the cause to the civil issue docket for trial by jury, where the superior court in term has jurisdiction to determine the whole matter in controversy as well as the issue of devisavit vel non. Morris v. Morris, 245 N.C. 30, 95 S.E.2d 110 (1956).

In the appointment and removal of guardians the appellate jurisdiction of the superior court is derivative, and appeals present for review only errors of law committed by the clerk. In re Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966).

Appeals under this section are confined to civil actions and special proceedings. The decisions are plenary that the removal of a guardian is neither. In re Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966).

The clerk has authority and jurisdiction, initially, **to pass upon exceptions** to the report of the commissioners in a special proceeding for partition. Allen v. Allen, 258 N.C. 305, 128 S.E.2d 385 (1962).

A proceeding to remove an executor or administrator is neither a civil action nor a special proceeding. Therefore, this section, which provides that "whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction" has no application to probate matters. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Applied in Clapp v. Clapp, 241 N.C. 281, 85 S.E.2d 153 (1954).

Quoted in Rich v. Norfolk S. Ry., 244 N.C. 175, 92 S.E.2d 768 (1956).

Cited in Woody v. Barnett, 235 N.C. 73, 68 S.E.2d 810 (1952); In re Will of Wood, 240 N.C. 134, 81 S.E.2d 127 (1954); McDaniel v. Fordham, 264 N.C. 62, 140 S.E.2d 736 (1965); In re Estate of Nixon, 2 N.C. App. 422, 163 S.E.2d 274 (1968).

§ 1-277. Appeal from superior court judge.—(a) An appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

(b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause. (1818, c. 962, s. 4, P. R.; C. C. P., s. 299; Code, s. 548; Rev., s. 587; C. S., s. 638; 1967, c. 954, s. 3.)

I. EDITOR'S NOTE.

The 1967 amendment designated the former provisions of the section as subsection (a) and added subsection (b).

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

II. APPEAL IN GENERAL.

A. General Consideration.

The proper method for obtaining relief from legal errors is by appeal under this section and not by application to another superior court. In such cases, a judgment entered by one judge of the superior court may not be modified, reversed or set aside by another superior court judge. Nowell v. Neal, 249 N.C. 516, 107 S.E.2d 107 (1959).

An immediate appeal is the proper method to obtain relief from legal errors and it may not be obtained by application to another superior court judge. A judgment entered by one superior court may not be modified, reversed, or set aside by another. North Carolina State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

And appeals lie from the superior court to the Supreme Court as a matter of right rather than as a matter of grace. Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

But Petitioner Alleging Denial Must Show Appeal Would Have Been Fruitful.—The weight of authority clearly stands for the proposition that the petitioner who claims he was denied his right to appeal through the neglect of counsel must show that his appeal would have been fruitful. Pitts v. North Carolina, 267 F. Supp. 870 (M.D.N.C. 1967).

This section regulates the practice of appeal in respect to when an order or judgment is subject to immediate review. State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965).

It Must Be Complied with.—Since there is no right to appeal outside the provisions of the statute, the requirements of the statute must be complied with for the appeal to be made. Pitts v. North Carolina, 267 F. Supp. 870 (M.D.N.C. 1967).

Causes coming before a judge are in the bosom of the court during term time. So long as his orders, judgments and rulings do not fall within the classifications set out in this section, no appeal therefrom will lie. Hollingsworth GMC Trucks, Inc. v. Smith, 249 N.C. 764, 107 S.E.2d 746 (1959).

Discretionary Power to Consider Premature and Fragmentary Appeal.—Even though an appeal is fragmentary and premature, the Supreme Court may exercise its discretionary power to express an opinion upon the question which the appellant has attempted to raise. Cowart v. Honeycutt, 257 N.C. 136, 125 S.E.2d 382 (1962); Barrier v. Randolph, 260 N.C. 741, 133 S.E.2d 655 (1963).

Applied in Goldston v. Wright, 257 N.C. 279, 125 S.E.2d 462 (1962); Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963); Rouse v. Snead, 269 N.C. 623, 153 S.E.2d 1 (1967).

Quoted in Waldron Buick Co. v. General Motors Corp., 251 N.C. 201, 110 S.E.2d 870 (1959); State ex rel. Gold v. Equity Gen. Ins. Co., 255 N.C. 145, 120 S.E.2d 452 (1961).

Stated in Raleigh v. Edwards, 234 N.C. 528, 67 S.E.2d 669 (1951).

Cited in Bell v. Smith, 263 N.C. 814, 140 S.E.2d 542 (1965); State Highway Comm'n v. Raleigh Farmers Market, Inc., 264 N.C. 139, 141 S.E.2d 10 (1965); Hagins v. Aero Mayflower Transit Co., 1 N.C. App. 51, 159 S.E.2d 592 (1968).

B. From What Decisions, Orders, etc., Appeal Lies.

Not every order or judgment of the superior court is immediately appealable to the Supreme Court. State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965).

Cause Directly Affected.—

If the judicial order complained of does not adversely affect the substantial rights of appellant, the appeal will be dismissed. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967).

Where a party is not aggrieved by the judicial order entered, his appeal will be dismissed. Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963).

Final Judgment.—

In accord with 2nd paragraph in original. See State v. Childs, 265, N.C. 575, 144 S.E.2d 653 (1965).

An appeal will lie only from a final judgment. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963).

A decision which disposes not of the whole but merely of a separate and distinct branch of the subject matter in litigation is final in nature and is immediately appealable. North Carolina State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

As a general rule orders and judgments which are not final in their nature, but leave something more to be done with the case are not immediately reviewable. The remedy is to note an exception at the time, to be considered on appeal from final judgment. Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957).

Interlocutory Orders.—

In accord with 2nd paragraph in original. See State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965).

In accord with 8th paragraph in original. See Gardner v. Price, 239 N.C. 651, 80 S.E.2d 478 (1954); Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E. (2d) 197 (1963).

An appeal will lie from an interlocutory order that affects a substantial right and will work injury if not corrected before final judgment. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963).

Ordinarily, an appeal lies only from a final judgment, but an interlocutory order which will work injury if not corrected before final judgment is appealable. North Carolina State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

Where the question sought to be presented involves property rights and relates to a matter of public importance, and a decision will aid State agencies in the performance of their duties, the Supreme Court may determine the appeal on the merits even though the appeal is from an interlocutory order and premature. Moses v. State Highway Comm'n, 261 N.C. 316, 134 S.E.2d 664 (1964).

An appeal does not lie to the Supreme Court from an interlocutory order of the superior court, unless such order deprives the appellant of a substantial right which he might lose if the order is not reviewed before final judgment. Shelby v. Lackey, 235 N.C. 343, 69 S.E.2d 607 (1952); Childers v. Powell, 243 N.C. 711, 92 S.E.2d 65 (1956); Tucker v. State Highway & Pub. Works Comm'n, 247 N.C. 171, 100 S.E.2d 514 (1957).

Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment. To this end, the statute defining the right of appeal prescribes in substance, that an appeal does not lie to the Supreme Court from an interlocutory order of the superior court, unless such interlocutory order deprives the appellant of a substantial right which he might lose if the order is not reviewed before final judgment. Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

An interlocutory order of a superior court judge affirming an order of the clerk entered in accordance with § 1-568.11, does not deprive appellant of a substantial right and no appeal lies therefrom. Black v. Williamson, 257 N.C. 763, 127 S.E.2d 519 (1962).

Refusal to Dismiss Action.—

A refusal of a motion to dismiss is not a final determination within the meaning of the statute and is not subject to appeal. Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957).

Adjudication that a release for personal injury signed by plaintiff was obtained by fraud does not prejudice defendant in trying the cause on its merits on the issue of negligence, and therefore an appeal taken prior to the trial on the merits from the adjudication that the release was void is premature and must be dismissed. Cowart v. Honeycutt, 257 N.C. 136, 125 S.E.2d 382 (1962).

Denial of Motion for Judgment on the Pleadings.—An appeal does not lie from a denial of a motion for judgment on the pleadings. Barrier v. Randolph, 260 N.C. 741, 133 S.E.2d 655 (1963).

Verdict Set Aside.—When a trial judge, in the exercise of his discretion, sets aside a verdict, his action may not be reviewed in the absence of any suggestion of an abuse of discretion. Atkins v. Doub, 260 N.C. 678, 133 S.E.2d 456 (1963).

Where the verdict is set aside in the court's discretion, there is no judgment from which an appeal may be taken, and on appeal from the action of the court setting the judgment aside, appellant cannot present his contentions of error in denying his motion for judgment as of nonsuit. Atkins v. Doub, 260 N.C. 678, 133 S.E.2d 456 (1963).

C. What Supreme Court Will Consider.

When Appeal Is Premature.—

In accord with 2nd paragraph in original. See Ingle v. McCurry, 243 N.C. 65, 89 S.E.2d 745 (1955).

Upon the hearing of exceptions to the referee's report, the court's order vacating the report and ordering a new survey is purely interlocutory and affects no substantial right, and an appeal therefrom is fragmentary and premature Cox v Shaw, 243 N.C. 191, 90 S.E.2d 327 (1955).

III. APPEAL AS TO PARTICULAR SUBJECTS.

B. Demurrer.

An order or judgment which sustains a demurrer affects a substantial right and a defendant may appeal therefrom. Rule 4(a), Rules of Practice in the Supreme Court, when otherwise applicable, limits the right of immediate appeal only in instances where the demurrer is overruled. Quick v. High Point Mem. Hosp., 269 N.C. 450, 152 S.E.2d 527 (1967).

Order Sustaining Demurrer to Plea in Bar. — An order or judgment which sustains a demurrer to a plea in bar affects a substantial right and a defendant may appeal therefrom Mercer v Hilliard, 249 N.C. 725, 107 S.E.2d 554 (1959); Hardin v. American Mut. Fire Ins. Co., 261 N.C. 67, 134 S.E.2d 142 (1964); Kleibor v. Rogers, 265 N.C. 304, 144 S.E.2d 27 (1965).

An appeal from a judgment sustaining a plea in bar is not regarded as premature. Cowart v. Honeycutt, 257 N.C. 136, 125 S.E.2d 382 (1962).

Order Striking Portion of Pleading. — When an order striking a portion of a pleading is in effect an order sustaining a demurrer and denying the pleader a right to recover for failure to state facts sufficient to constitute a cause of action, it is within the provisions of this section and appealable. Etheridge v. Carolina Power & Light Co., 249 N.C. 367, 106 S.E.2d 560 (1959).

Rule 4 (a), Rules of Practice in the Court of Appeals, has no application when the order striking a portion of the pleading is in effect a demurrer denying the pleader a right to recover for failure to state facts sufficient to constitute a cause of action. Such an order comes within the provisions of this section and the party adversely affected may appeal. McAdams v. Blue, 3 N.C. App. 169, 164 S.E.2d 490 (1968).

A motion to strike allegations in the complaint was equivalent to a demurrer to the purported cause of action, and the effect of an order allowing the motion was to sustain the demurrer. Rule 4(a), Rules of Practice in the Supreme Court, has no application to such orders, for they come within the provisions of this section. Davis v. North Carolina State Highway Comm'n, 271 N.C. 405, 156 S.E.2d 685 (1967).

Where plaintiff alleged a cause of action for wrongful death and a cause of action to recover damages for pain and suffering endured by his intestate from the time of injury to the date of death, the allowance of a motion to strike all the allegations stating the cause of action for pain and suffering amounted to a demurrer dismissing that cause of action, and the order was immediately appealable. Sharpe v. Pugh, 270 N.C. 598, 155 S.E.2d 108 (1967).

Order Allowing Motion to Strike Allegations in Answer.—In a proceeding by a housing authority to condemn land, a motion of the housing authority to strike in their entirety allegations in the answer setting up a plea in bar that the housing authority acted capriciously and arbitrarily in selecting the land for the site of the housing project, was in effect a demurrer to the plea in bar, and an order allowing the motion is appealable. Housing Authority of City of Wilson v. Wooten, 257 N.C. 358, 126 S.E.2d 101 (1962).

Order Allowing Plaintiff to Withdraw Appeal from Final Judgment and File Amended Complaint. — Where, upon demurrer, a cause of action is dismissed, and at a subsequent term plaintiff is allowed to withdraw her appeal from the final judgment and file an amended complaint, such order affects a substantial right of the defendant and he is entitled to appeal therefrom. Mills v. Richardson, 240 N.C. 187, 81 S.E.2d 409 (1954).

D. Injunction.

Interlocutory Injunction.—

Appeal from an interlocutory injunction is not considered premature and will be entertained by the Court of Appeals if a substantial right of the appellant would be adversely affected by continuance of the injunction in effect pending final determination of the case. Cablevision of Winston-Salem v. City of Winston-Salem, 3 N.C. App. 252, 164 S.E.2d 737 (1968).

In reviewing on appeal an order granting or continuing an interlocutory injunction in effect pending final determination of the case, the Court of Appeals is not bound by the findings of fact made by the trial court, but may review and weigh the evidence and find the facts for itself. Cablevision of Winston-Salem v. City of Winston-Salem, 3 N.C. App. 252, 164 S.E.2d 737 (1968).

Injunction against Cutting Timber. — Where plaintiffs were estopped to assert title to land in controversy, an order enjoining them from cutting timber which they did not own did not affect any substantial right of theirs; hence, plaintiffs were not parties aggrieved. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963).

E. Nonsuit.

In General.—

Where the clerk permits voluntary nonsuit in an action in which defendant has asserted his right to affirmative relief, order of the superior court reversing the clerk's judgment of nonsuit has the same effect as if plaintiff's motion for dismissal as of voluntary nonsuit had been made in the first instance before the judge, and attempted appeal from the order reversing the nonsuit is a nullity notwithstanding that the judge signs the appeal entries Cox v Cox, 246 N.C. 528, 98 S.E.2d 879 (1957).

Setting Aside Nonsuit.—Where the superior court granted nonsuit on defendant's counterclaim, but after the jury's failure to reach a verdict on plaintiff's action, withdrew a juror, ordered a mistrial, and set aside the nonsuit on the counterclaim, although the striking out of the nonsuit involved a question of law, the court had the right to change his ruling on the motion any time before verdict, and therefore the exercise of such right could not affect a substantial right of plaintiff, and the action of the court is not appealable. Hollingsworth GMC Trucks, Inc. v. Smith, 249 N.C. 764, 107 S.E.2d 746 (1959).

F. Order of Reference and Referee's Report.

Relating to Reference of Cause.—

Ordinarily an appeal will not lie from an order of compulsory reference made pursuant to statute, and where there is no complete plea in bar to the entire case Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

Vacating Report and Ordering New Survey. — Upon the hearing of exceptions to the referee's report, the court's order vacating the report and ordering a new survey is purely interlocutory and affects no substantial right, and an appeal therefrom is fragmentary and premature Cox v. Shaw, 243 N.C. 191, 90 S.E.2d 327 (1955)

G. Appeals as to Miscellaneous Subjects.

An order appointing a next friend for plaintiff is an order affecting a substantial right from which plaintiff may appeal. Hagins v. Redevelopment Comm'n, 1 N.C. App. 40, 159 S.E.2d 584 (1968).

Order Providing for Joinder of Additional Parties.—While ordinarily an order providing for the joinder of additional parties is not appealable, in an action by an injured employee against a third person tort-feasor, in accordance with the provisions of G S 97-10, an order joining the employer and insurance carrier affects the substantial right of the employee to prosecute the action to a final determination without the presence of wholly unnecessary parties, and therefore is appealable Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

Order Permitting Intervention.—Where there is no subsisting controversy as between plaintiff and defendants, an order permitting intervention by parties who may litigate their claim against plaintiff by independent action will be reversed Childers v. Powell, 243 N.C. 711, 92 S.E.2d 65 (1956).

An order of the superior court remanding the cause to the Industrial Commission is an interlocutory order and an appeal therefrom to the Supreme Court is premature and is subject to dismissal However, the Supreme Court in the exercise of its supervisory jurisdiction may, in proper instances, determine the matter in order to obviate a wholly unnecessary and circuitous course of procedure. Edwards v. City of Raleigh, 240 N.C. 137, 81 S.E.2d 273 (1954).

An order entered in a proceeding to abate a public nuisance directing the reopening of defendant's safe and the making of an inventory of the contents, without any showing that the contents of the safe were relevant to that proceeding, is an order affecting a substantial right of defendant, from which appeal lies under this section. State ex rel. Hooks v. Flowers, 247 N.C. 558, 101 S.E.2d 320 (1958).

A judgment in a processioning proceeding adopting the referee's findings and conclusions was a final judgment and as such was only reviewable by appeal to this court. Harrill v. Taylor, 247 N.C. 748, 102 S.E.2d 223 (1958).

Boundary Dispute.—An order requiring petitioners in a proceeding to establish a disputed boundary to elect between the boundary described in their petition and their claim of title to another line by adverse possession under their amendment to their petition, affects a substantial right and is appealable. Jenkins v. Trantham, 244 N.C. 422, 94 S.E.2d 311 (1956).

Condemnation by State Highway Commission.—When the State Highway Commission condemns property under ch. 136, art. 9, appeals by either party are governed by this section, the same as any other civil action. North Carolina State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

§ 1-278. Interlocutory orders reviewed on appeal from judgment.

Applied in Goldston v. Wright, 257 N.C. 279, 125 S.E.2d 462 (1962).

Cited in City of Raleigh v. Edwards, 234 N.C. 528, 67 S.E.2d 669 (1951).

§ 1-279. When appeal taken.

Constitutionality.—Section 15-180, by incorporating the provisions of this section, provides that notice of appeal must be filed within ten days after rendition of judgment. The constitutionality of this requirement was upheld by the Supreme Court of the United States in Brown v. Allen, 344 U.S. 443, 73 Sup. Ct. 397, 97 L. Ed. 469 (1953). Fox v. North Carolina, 266 F. Supp. 19 (E.D.N.C. 1967).

The provisions of this section and § 1-280 are jurisdictional, and unless they are complied with the Supreme Court acquires no jurisdiction of an appeal and must dismiss it. Aycock v. Richardson, 247 N.C. 233, 100 S.E.2d 379 (1957); Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963); Teague v. Teague, 266 N.C. 320, 146 S.E.2d 87 (1966); Dunn v. North Carolina State Highway Comm'n, 1 N.C. App. 116, 160 S.E.2d 113 (1968).

When the requirements of this section and § 1-280 are not complied with, the Supreme Court obtains no jurisdiction of a purported appeal and must dismiss it. Oliver v. Williams, 266 N.C. 601, 146 S.E.2d 648 (1966).

What This Section and § 1-280 Require.—This section and § 1-280 require an appellant who gives notice of appeal from a judgment rendered out of term to cause his appeal to be entered by the clerk on the judgment docket within ten days after notice thereof. Summey v. McDowell, 4 N.C. App. 62, 165 S.E.2d 768 (1969).

Appeals lie from the superior court to the Supreme Court as a matter of right rather than as a matter of grace. Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

Defendant Held Not to Have Knowingly and Intelligently Waived His Right of Appeal. — See Fox v. North Carolina, 266 F. Supp. 19 (E.D.N.C. 1967).

Applied in Van Mitchell v. North Carolina, 247 F. Supp. 139 (E.D.N.C. 1964).

Cited in State v. Ferebee, 266 N.C. 606, 146 S.E.2d 666 (1966); Hagins v. Redevelopment Comm'n, 1 N.C. App. 40, 159 S.E.2d 584 (1968). Hagins v. Aero Mayflower Transit Co., 1 N.C. App. 51, 159 S.E.2d 592 (1968).

§ 1-280. Entry and notice of appeal.

The Provisions of This Section and § 1-279 Are Jurisdictional. — See note to § 1-279.

What This Section and § 1-279 Require.—This section and § 1-279 require an appellant who gives notice of appeal from a judgment rendered out of term to cause his appeal to entered by the clerk on the judgment docket within ten days after notice thereof. Summey v. McDowell, 4 N.C. App. 62, 165 S.E.2d 768 (1969).

Appeals lie from the superior court to the Supreme Court as a matter of right rather than as a matter of grace. Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

Cited in State v. Ferebee, 266 N.C. 606, 146 S.E.2d 666 (1966).

§ 1-281. Appeals from judgments not in term time.

Clerk Not Authorized to Enlarge Time for Service of Case on Appeal.—This section does not authorize a clerk of the superior court to enlarge the time for service of a statement of the case on appeal in those instances in which appeal is taken from judgment rendered by the court out of term and out of the district by agreement. Little v. Sheets, 239 N.C. 430, 80 S.E.2d 44 (1954).

§ 1-282. Case on appeal; statement, service, and return.—The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the request of the counsel of the parties for instructions if there be any exception on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within fifteen days from the entry of the appeal taken; within ten days after such service the respondent shall return the copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved. If it appears that the case on appeal cannot be served within the time prescribed above, the trial judge may, for good cause and after reasonable notice to the opposing party or counsel, enter an order or successive orders extending the time for service of the case on appeal and of the countercase or exceptions to the case on appeal. The initial order of extension must be entered prior to expiration of the statutory time for service of the case on appeal, and any subsequent order of extension must be entered prior to the expiration of the time allowed by the preceding order, and all additional time or times granted in such order or orders of extension must terminate within sufficient time to enable appellant to docket the record on appeal in accordance with the requirements of the rules of the appellate court. (C. C. P., s. 301; Code, s. 550; 1905, c. 448; Rev., s. 591; C. S., s. 643; 1921, c. 97; 1969, c. 1190, s. 35.)

I. EDITOR'S NOTE.

The 1969 amendment, effective July 1, 1969, deleted, at the end of the section, a proviso authorizing the judge to enlarge the time in which to serve the statement of case on appeal and exceptions thereto or counter statement of case, and added the present last two sentences of the section.

II. GENERAL CONSIDERATION —COUNTERCASE.

Procedure Generally.—In those instances requiring a case on appeal, the appellant must serve statement of case on appeal on appellee or its attorney under this section; if the parties do not agree the case must be settled by the court under § 1-283; if the appeal is on the record proper, it must be certified to the Supreme Court by the clerk of the superior court under § 1-284. Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963).

Strict Observance, etc.—

The provisions of this section are mandatory. Twiford v. Harrison, 260 N.C. 217, 132 S.E.2d 321 (1963).

The right of appeal is not an absolute right, but is only given upon compliance with the requirements of the statute. Roberts v. Stewart, 3 N.C. App. 120, 164 S.E.2d 58 (1968).

Preparation of Record on Appeal.—It is not the function of the appellate court to oversee the preparation of the record on appeal; that is the function of counsel. State v. Waddell, 3 N.C. App. 58, 164 S.E.2d 75 (1968).

It is the duty of appellant to see that the record is properly made up and transmitted to the court. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

Necessity for Filing Record on Appeal.—Until a record on appeal is filed, there is nothing before the appellate court. State v. Waddell, 3 N.C. App. 58, 164 S.E.2d 75 (1968).

Evidence Need Not Be Set Forth in Its Entirety.—It is not required that the appellant set forth in his statement of the case on appeal the evidence in its entirety. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

It is common practice to omit portions of the testimony deemed by the parties of no consequence upon the appeal. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

The time for docketing the record on appeal in the Court of Appeals is determined by Rule 5, Rules of Practice in the Court of Appeals, and should not be confused with the time allowed for serving case on appeal and the time allowed for serving countercase or exceptions. The case on appeal, and the countercase or exceptions, and the settlement of case on appeal by the trial tribunal must all be accomplished within a time which will allow docketing of the record on appeal within the time allowed under Rule 5. The trial tribunal, upon motion by appellant, and upon a finding of good cause therefor, may enter an order extending the time for docketing the record on appeal in the Court of Appeals not exceeding a period of 60 days beyond the 90 days provided by Rule 5. However, this cannot be accomplished by an order allowing additional time to serve case on appeal. State v. Farrell, 3 N.C. App. 196, 164 S.E.2d 388 (1968).

Record Imports Verity.—

The record on appeal imports verity. State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

The appellate court is bound by the contents of the record on appeal. State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

A record filed in a petition for a writ of certiorari, nothing else appearing, does not become the record on appeal upon allowance of the writ. State v. Waddell, 3 N.C. App. 58, 164 S.E.2d 75 (1968).

Authority of Court from Which Appeal Taken.—After an appeal is taken, the court from which it is taken has no authority with reference to the appellate procedure except that specifically conferred upon it by statute. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

Duties of Attorney General and Solicitor as to Case on Appeal.—See State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

Effect of Failure to Serve Countercase.—

The authority of the trial judge to settle a case on appeal may be invoked only by the service of a countercase or by filing exceptions to the appellant's statement of case; otherwise the appellant's statement becomes the case on appeal. American Floor Mach. Co. v. Dixon, 260 N.C. 732, 133 S.E.2d 659 (1963); Roberts v. Stewart, 3 N.C. App. 120, 164 S.E.2d 58 (1968).

Where the solicitor does not serve any countercase or exceptions to defendant's statement of case on appeal, defendant's statement becomes the case on appeal. State v. Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966).

Supreme Court order granting time in which to serve statement of case on appeal and time in which to serve exceptions or countercase. and providing that if the case should not be settled by agreement it should be settled by the trial judge within a given time, does not relieve appellant of the duty of requesting the judge to settle the case and of otherwise performing the duties imposed by this section and § 1-283. Wiggins v. Tripp, 253 N.C. 171, 116 S.E.2d 355 (1960).

Judicial Notice.—The appellate court can judically know only that which appears in the record. State v. Waddell, 3 N.C. App. 58, 164 S.E.2d 75 (1968).

Applied in State v. Stubbs, 265 N.C. 420, 144 S.E.2d 262 (1965); Nicholson v. Dean, 267 N.C. 375, 148 S.E.2d 247 (1966).

Cited in Richardson v. Cooke, 238 N.C. 449, 78 S.E.2d 208 (1953); Conrad v. Conrad, 252 N.C. 412, 113 S.E.2d 912 (1960); Wagner v. Eudy, 257 N.C. 199, 125 S.E.2d 598 (1962); Hodge v. Robertson, 2 N.C. App. 216, 162 S.E.2d 594 (1968).

III. REQUISITES OF CASE ON APPEAL—EXCEPTIONS.

Concise, etc.—

The record on appeal should consist of a plain, accurate, and concise statement of what the record shows occurred in the trial court, compiled and presented in the order prescribed and pursuant to Rule 19 of the Rules of Practice in the Court of Appeals of North Carolina. State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

Assignments of error may not be filed initially in the Supreme Court, but must be filed in the trial court and certified with the case on appeal State v Dew. 240 N.C. 595, 83 S.E.2d 482 (1954); E.L. Lowie & Co. v. Atkins, 245 N.C. 98, 95 S.E.2d 271 (1956).

Appeal Itself Treated as Exception to Judgment.—Where the exceptions are not grouped, the assignments of error will not be considered. but the appeal itself will be treated as an exception to the judgment. Ellis v. Atlantic Coast Line R.R., 241 N.C. 747, 86 S.E.2d 406 (1955).

V. SERVICE OF CASE AND COUNTERCASE

A Necessity and Mode of Service.

Rules requiring service to be made of case on appeal are mandatory. They are applied alike to all appellants State v Daniels, 231 N.C. 17, 341, 56 S.E.2d 2, 646 (1949), 231 N.C. 509, 57 S.E.2d 653 (1950), cert. den. 339 U.S. 954, 70 S. Ct. 837, 94 L. Ed. 1366 (1950); Brown v. Allen, 344 U.S. 443, 73 S. Ct. 397, 437 (1953).

Rules requiring service to be made of case on appeal within the allotted time are mandatory, not directive. Roberts v. Stewart, 3 N.C. App. 120, 164 S.E.2d 58 (1968).

Effect of Failure to Serve Countercase or Exceptions.—

In accord with 1st paragraph in original. See State v. Clayton, 251 N.C. 261, 111 S.E.2d 299 (1959).

B Time of Service.

1. In General.

Strict Compliance Required.—

Rules requiring service to be made of case on appeal within the allotted time are mandatory, not directive. American Floor Mach. Co. v. Dixon, 260 N.C. 732 133 S.E.2d 659 (1963).

Where appellant's statement of case on appeal was not served within the time allowed by agreement of counsel, the judge was without authority to settle the case, and his attempted settlement of the case, without finding that service within the stipulated time had been waived, did not cure the defect. American Floor Mach. Co. v. Dixon, 260 N.C. 732 133 S.E.2d 659 (1963).

Only Judge May Enlarge Time for Service.—The General Assembly having expressly fixed the time for serving a statement of case on appeal, and having specifically authorized the judge, in his discretion, to enlarge the time, it would seem, therefore, that this procedure is exclusive And it will not be assumed that the General Assembly intended by § 1-281 to give to a clerk of the superior court implied authority to do that for which express authority is given to the judge in this section. Little v. Sheets, 239 N.C. 430, 80 S.E.2d 44 (1954).

By the terms of this section, only the judge who tried the case can extend the time for serving the statement of the case on appeal. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

Subsequent Extension.—Having granted one extension, the judge may not grant another after the expiration of the term at which the judgment was entered. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), decided prior to 1969 amendment to this section.

3. Effect of Failure to Serve in Time.

Record Proper May Be Reviewed for Error Appearing on Its Face.—Where the statement of a case on appeal is not filed within the time allowed, it is a nullity, but failure of the case on appeal does not require dismissal, since the record proper may be reviewed for error appearing on its face and the judgment affirmed on motion of appellant when no error so appears Little v. Sheets, 239 N.C. 430, 80 S.E.2d 44 (1954).

Normally, the effect of failure to serve the appellant's statement of the case on appeal within the time fixed by the statute, or within the period of such authorized extension by the trial judge, is that upon such appeal the Supreme Court is limited to a consideration of the record proper and if no errors appear on the face thereof, the judgment will be affirmed. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

VI. RELIEF GRANTED.

When No Case on Appeal.—

In the absence of a case on appeal served within the time fixed by the statute, or by valid enlargement, the appellate court will review only the record proper and determine whether errors of law are disclosed on the face thereof. American Floor Mach. Co. v. Dixon, 260 N.C. 732, 133 S.E.2d 659 (1963).

§ 1-283. Settlement of case on appeal.

Procedure Generally.—See same catchline in note to § 1-282, analysis line II.

The provisions of this section are mandatory. Twiford v. Harrison, 260 N.C. 217, 132 S.E.2d 321 (1963).

Effect of Failure to Serve Countercase or Exceptions.—The authority of the trial judge to settle a case on appeal may be invoked only by the service of a countercase or by filing exceptions to the appellant's statement of case; otherwise the appellant's statement becomes the case on appeal. American Floor Mach. Co. v. Dixon, 260 N.C. 732, 133 S.E.2d 659 (1963).

Until a record on appeal is filed, there is nothing before the appellate court. State v. Waddell, 3 N.C. App. 58, 164 S.E.2d 75 (1968).

Preparation of Record on Appeal.—It is not the function of the appellate court to oversee the preparation of the record on appeal; that is the function of counsel. State v. Waddell, 3 N.C. App. 58, 164 S.E.2d 75 (1968).

Duty of Judge.—

If the solicitor and counsel for the defendant do not agree on the record on appeal, the judge who tried the case is required to settle the record on appeal as provided by law. State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

He Cannot Settle Case by Anticipatory Order.—

In accord with 1st paragraph in original See Hall v. Hall, 235 N.C. 711, 71 S.E.2d 471 (1952).

Judge May Act Only Where Counsel Disagree.—

In accord with original See Hall v Hall, 235 N.C. 711, 71 S.E.2d 471 (1952).

Supreme Court order granting time in which to serve statement of case on appeal.—See same catchline under § 1-282

Where there is no proper statement of case on appeal, the Supreme Court can determine only whether there is error on the face of the record. Wiggins v. Tripp, 253 N.C. 171, 116 S.E.2d 355 (1960); Twiford v. Harrison, 260 N.C. 217, 132 S.E.2d 321 (1963).

A record filed in a petition for a writ of certiorari, nothing else appearing, does not become the record on appeal upon allowance of the writ. State v. Waddell, 3 N.C. App. 58, 164 S.E.2d 75 (1968).

Judicial Notice. — The appellate court can judicially know only that which appears in the record. State v. Waddell, 3 N.C. App. 58, 164 S.E.2d 75 (1968).

Applied in State v. Stubbs, 265 N.C. 420, 144 S.E.2d 262 (1965).

Cited in Richardson v. Cooke, 238 N.C. 449, 78 S.E.2d 208 (1953); Conrad v. Conrad, 252 N.C. 412, 113 S.E.2d 912 (1960); Wagner v. Eudy, 257 N.C. 199, 125 S.E.2d 598 (1962).

§ **1-284. Clerk to prepare transcript.**—The clerk or appropriate official of the trial tribunal, on receiving a copy of the case settled, as required in the preceding sections, shall make a copy of the judgment roll and of the case, and within twenty days transmit the same, duly certified, to the appropriate clerk of the appellate division. The clerk, or appropriate official of the trial tribunal, except in cases where parties are allowed to appeal without giving an undertaking on appeal, shall not be required to make the copy of the record in the case for the appellate division until the appellant has given the undertaking on appeal or made the deposit required. (C. C. P., s. 302; Code, s. 551; 1889, c. 135; Rev., s. 592; C. S., s. 645; 1969, c. 44, s. 4.)

I. EDITOR'S NOTE.

The 1969 amendment inserted "or appropriate official of the trial tribunal" in the first and second sentences, substituted "appropriate clerk of the appellate division" for "clerk of the Supreme Court" in the first sentence and substituted "appellate division" for "Supreme Court" in the second sentence.

II. GENERAL CONSIDERATION.

Procedure Generally.—See same catchline in note to § 1-282, analysis line II.

§ **1-285. Undertaking on appeal; filing; waiver.**—To render an appeal effectual for any purpose in a civil cause or special proceeding, a written undertaking must be executed on the part of the appellant, with good and sufficient surety, in such sum as may be ordered by the court, not exceeding two hundred and fifty dollars, to the effect that the appellant will pay all costs awarded against him on the appeal, and this undertaking must be filed with the clerk by whom the judgment or order was entered; or such sum as is ordered by the court must be deposited with the clerk by whom the judgment or order was entered, to abide the event of the appeal. The undertaking or deposit may be waived by a written consent on the part of the respondent. No appeal shall be dismissed in the appellate division on the ground that the undertaking on appeal was not filed or deposit made, earlier, if the undertaking is filed or the deposit made before the record of the case is transmitted by the clerk of the superior court to the appellate division. When no undertaking on appeal has been filed, or deposit made before the record of the case is transmitted to the appellate division, the appellate division shall, upon good cause shown, on such terms as may be just, allow the appellant to file an undertaking or make the deposit. (C. C. P., ss. 303, 312; 1871-2, c. 31; Code, ss. 552, 561; 1889, c. 135, s. 2; Rev., ss. 593, 595; C. S., s. 646; 1969, c. 44, s. 5.)

I. GENERAL CONSIDEFATION.

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" twice in the third sentence and twice in the fourth sentence.

This section has no application to appeals from a justice of the peace to the superior court. Massenburg v. Fogg, 256 N.C. 703, 124 S.E.2d 868 (1962).

Cited in Richardson v. Cooke, 238 N.C. 449, 78 S.E.2d 208 (1953).

§ **1-287. Notice of motion to dismiss; new bond or deposit.**—Before the appellee is permitted to move to dismiss an appeal, either for any irregularity in the undertaking on appeal or for failure of sureties to justify, he must give written notice to the appellant of such motion at least twenty days before the district from which the cause is sent up is called, and this notice must state the grounds upon which the motion is based. At least five days before the district from which the cause is sent up is called, the appellant may file with the appropriate clerk of the appellate division a new bond justified according to law and containing a penalty the same in amount as the penalty in the original bond, or he may deposit with the said clerk a sum of money equal to the penalty in the original bond. When a new bond has been thus filed or deposit made the cause stands as if the bond had been duly given or deposit duly made in the court below. (1887, c. 121; Rev., s. 596; C. S., s. 648; 1969, c. 44, s. 6.)

Editor's Note.—The 1969 amendment substituted "appropriate clerk of the appellate division" for "clerk of the Supreme Court" in the second sentence.

§ 1-287.1. Dismissal of appeals to appellate division when statement of case not served within time allowed. — When it appears to the superior court that statement of case on appeal to the appellate division has not been served on the appellee or his counsel within the time allowed, it shall be the duty of the superior court judge, upon motion by the appellee, to enter an order dismissing such appeal; provided the appellant has been given at least five (5) days' notice of such motion. The motion herein provided for may be heard by either the resident judge, the presiding judge, a special judge residing within the district, or the judge assigned to hold the courts of the district, in term or out of term, in any county of the district. The provisions of this section shall not apply in any case in which a sentence of death has been pronounced. The provisions of this section shall not apply in any case with respect to which there is no requirement to serve a case on appeal. The provisions of this section are not exclusive but are in addition to any other procedures for obtaining the dismissal of a case on appeal to the appellate division. (1959, c. 743; 1965, c. 136; 1969, c. 44, s. 7)

Editor's Note.—The 1965 amendment substituted "superior court judge" for "presiding judge" in the first sentence and added the present second sentence.

The 1969 amendment substituted "appellate division" for "Supreme Court" in the first and last sentences.

Statutory requirements with reference to notice are strictly construed where the giving of notice must be relied upon to divest the recipient of a right. Holsomback v. Holsomback, 273 N.C. 728, 161 S.E.2d 99 (1968).

Appeal from County Civil Court.—This section relates to the dismissal of an appeal from the superior court to the appellate division. If applicable under any circumstances to an appeal from a county civil court to the superior court, it could apply only to a motion to dismiss addressed to the county civil court. Pendergraft v. Harris, 267 N.C. 396, 148 S.E.2d 272 (1966).

Appeal Is Subject to Dismissal in Superior Court.—Where the case on appeal is not served within the time allowed it is subject to dismissal in the superior court pursuant to this section, without moving to docket and dismiss in the appellate division. Williams v Asheville Contracting Co., 257 N.C. 769, 127 S.E.2d 554 (1962).

But Section Does Not Apply When Case Has Been Docketed.—This section does not apply when the case on appeal has been docketed in the appellate division. Leggett v. Smith-Douglass Co., 257 N.C. 646, 127 S.E.2d 222 (1962).

When the case on appeal has been docketed in the appellate division the appeal may not be withdrawn without the approval of the appellate division. Leggett v. Smith-Douglass Co., 257 N.C. 646, 127 S.E.2d 222 (1962).

Effect of Abandoning Appeal.—When an appeal is abandoned or not perfected within the time allowed, the order of the lower court sustaining a demurrer and dismissing the action becomes the law of the case and the plaintiff is thereby precluded from amending his complaint which ordinarily may be done when a demurrer is sustained without dismissing the action. Williams v Asheville Contracting Co., 257 N.C. 769, 127 S.E.2d 554 (1962).

Applied in Edwards v. Edwards, 261 N.C. 445, 135 S.E.2d 18 (1964); State v. Fowler, 266 N.C. 528, 146 S.E.2d 418 (1966); Pelaez v. Carland, 268 N.C. 192, 150 S.E.2d 201 (1966).

Cited in Conrad v. Conrad, 252 N.C. 412, 113 S.E.2d 912 (1960); Elmore v. Elmore, 4 N.C. App. 192, 166 S.E.2d 506 (1969).

§ **1-288. Appeals in forma pauperis; clerk's fees.** — When any party to a civil action tried and determined in the superior court at the time of trial desires an appeal from the judgment rendered in the action to the appellate division, and is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, it shall be the duty of the judge or clerk of said superior court to make an order allowing said party to appeal from the judgment to the appellate division as in other cases of appeal, without giving security therefor. The party desiring to appeal from the judgment shall, during the term at which the judgment was rendered or within ten days from the expiration by law of the term, make affidavit that he is unable by reason of his poverty to give the security required by law, and that he is advised by a practicing attorney that there is error in matter of law in the decision of the superior court in said action. The affidavit must be accompanied by a written statement from a practicing attorney of said superior court that he has examined the affiant's case, and is of opinion that the decision of the superior court, in said action, is contrary to law. The request for appeal shall be passed upon and granted or denied by the clerk within ten days from the expiration by law of said term of court. The clerk of the superior court cannot demand his fees for the transcript of the record for the appellate division of a party appealing in forma pauperis, in case such appellant furnishes to the clerk two true and correctly typewritten copies of such records on appeal. Nothing contained in this section deprives the clerk of the superior court of his right to demand his fees for his certificate and seal as now allowed by law in such cases. Provided, that where the judge of the superior court or the clerk of the superior court has made an order allowing the appellant to appeal as a pauper and the appeal has been filed in the appellate division, and an error or omission has been made in the affidavit or certificate of counsel, and the error is called to the attention of the court before the hearing of the argument of the case, the court shall permit an amended affidavit or certificate to be filed correcting the error or omission. (1873-4, c. 60; Code, s. 553; 1889, c. 161; Rev., s. 597; 1907, c. 878; C. S., s. 649; 1937, c. 89, 1951, c. 837, s. 7; 1969, c. 44, s. 8.)

Editor's Note.—

The 1969 amendment substituted "appellate division" for "Supreme Court" throughout the section.

Section Mandatory.—

In accord with 2nd paragraph in original. See Dobson v. Johnson, 237 N.C. 275, 74 S.E.2d 652 (1953); Anderson v. Worthington, 238 N.C. 577, 78 S.E.2d 333 (1953).

In accord with 3rd paragraph in original See Dobson v. Johnson, 27 N.C. 275, 74 S.E.2d 652 (1953); Prevatte v. Prevatte, 239 N.C. 120, 79 S.E.2d 264 (1953).

Failure to Obtain Order Allowing Appeal.—Where the judge writes on the judgment that plaintiff shall be allowed to appeal in forma pauperis upon compliance with this section, but plaintiff obtains no order allowing appeal in forma pauperis after the filing of an affidavit of poverty subsequent to the term, the appeal must be dismissed for failure to comply with the mandatory provision of this section Prevatte v. Prevatte, 239 N.C. 120, 79 S.E.2d 264 (1953).

Order Must Be Obtained within Statutory Time.—

Where application to the clerk of the superior court, supported by affidavit and certificate, for leave to appeal in forma pauperis, was not made until more than ten days after expiration of the term of court at which the judgment was rendered, the appeal must be dismissed, the requirements of this section being mandatory and jurisdictional Anderson v Worthington, 238 N.C. 577, 78 S.E.2d 333 (1953).

Application May Be Made to either Trial Judge or Clerk.—Under this section, the party aggrieved by the judgment of the superior court may apply to either the trial judge or the clerk of the superior court for leave to appeal to the appellate division in forma pauperis. Anderson v. Worthington, 238 N.C. 577, 78 S.E.2d 333 (1953).

Cited in Richardson v. Cooke, 238 N.C. 449, 78 S.E.2d 208 (1953).

§ **1-289. Undertaking to stay execution on money judgment.**

Applied in Jim Walter Corp. v. Gilliam, 260 N.C. 211 132 S.E.2d 313 (1963).

§ 1-294. Scope of stay; security limited for fiduciaries

When Proceedings Not Stayed by Interlocutory Appeal.—

An attempted appeal from a nonappealable interlocutory order is a nullity and does not divest the superior court of jurisdiction to proceed in the action. Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957).

Question of Sufficiency of Defense Bond—Where a complaint states a cause of action for the recovery of real property, the question of the sufficiency of the defense bond required by § 1-111 is "a matter included in the action," which is not affected in a legal sense by a motion of the defendant to strike the reply. Scott v. Jordan, 235 N.C. 244, 69 S.E.2d 557 (1952).

Order Allowing Plaintiff to File Amended Complaint. — The pendency of an appeal from an order allowing plaintiff to file an amended complaint does not deprive the superior court of jurisdiction to appoint a receiver based on allegations in the amended complaint. York v. Cole, 251 N.C. 344, 111 S.E.2d 334 (1959).

§ 1-296. Judgment not vacated by stay.—The stay of proceedings provided for in this article shall not be construed to vacate the judgment appealed from, but in all cases such judgment remains in full force and effect, and its lien remains unimpaired, notwithstanding the giving of the undertaking or making the deposit required in this chapter, until such judgment is reversed or modified by the appellate division. (1887, c. 192; Rev., s. 604; C. S., s. 657; 1969, c. 44, s. 9.)

Editor's Note.—

The 1969 amendment substituted "appellate division" for "Supreme Court" at the end of the section.

§ 1-297. Judgment on appeal and on undertakings; restitution. — Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment. Undertakings for the prosecution of appeals and on writs of certiorari shall make a part of the record sent up to the appellate division on which judgment may be entered against the appellant or person prosecuting the writ of certiorari and his sureties, in all cases where judgment is rendered against the appellant or person prosecuting the writ. (1785, c. 233, s. 2, P. R.; 1810, c. 793, P. R.; 1831, c. 46, s. 2; R. C., c. 4, s. 10; C. C. P., s. 314; Code, s. 563; Rev., s. 605; C. S., s. 658; 1969, c. 44, s. 10.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" in the third sentence.

Technical Formal or Trivial Defects.—A new trial will not be awarded for mere technical error when it appears that the jury could not have been misled thereby. Burleson v. Helton, 258 N.C. 782, 129 S.E.2d 491 (1963).

§ 1-298. Procedure after determination of appeal. — In civil cases, at the first term of the superior court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if the judgment is modified, shall direct its modification and performance. If a new trial is ordered the cause stands in its regular order on the docket for trial at such first term after the receipt of the certificate from the appellate division. (1887, c. 192, s. 2; Rev., s. 1526; C. S., s. 659; 1969, c. 44, s. 11.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" at the end of the section.

Section applies only to judgments of superior court which have been affirmed or modified on appeal. D & W, Inc. v. City of Charlotte, 268 N.C. 720, 152 S.E.2d 199 (1966).

It has no application to decision of appellate division reversing judgment of lower court. D & W, Inc. v. City of Charlotte, 268 N.C. 720, 152 S.E.2d 199 (1966).

§ 1-299. Appeal from justice heard de novo; judgment by default; appeal dismissed. — When an appeal is taken from the judgment of a justice of the peace to a superior court, it shall be therein reheard, on the original papers, and no copy thereof need be furnished for the use of the appellate court. An issue shall be made up and tried by a jury at the first term to which the case is returned, unless continued, and judgment shall be given against the party cast and his sureties. When the defendant defaults, the plaintiff in actions instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, shall have judgment, and in other cases may have his inquiry of damages executed forthwith by a jury. If the appellant fails to have his appeal docketed as required by law, the appellee may, at the term of court next succeeding the term to which the appeal is taken, have the case placed upon the docket, and upon motion the judgment of the justice shall be affirmed and judgment rendered against the appellant, and for the costs of appeal and against his sureties upon the undertaking, if there are any, according to the conditions thereof. Nothing herein prevents the granting the writ of recordari in cases now allowed by law. Whenever such appeal is docketed and is regularly set for trial, and the appellant, whether plaintiff or defendant, fails to appear and prosecute his appeal, the presiding judge may have the appellant called and the appeal dismissed; and in such case the judgment of the justice of the peace shall be affirmed. (1777, c. 115, s. 63, P. R.; 1794, c. 414, P. R.; R. C., c. 31, s. 105; C. C. P., s. 540; Code, ss. 565, 881; 1889, c. 443; Rev., ss. 607, 609; C. S., s. 660; 1955, c. 256.)

I. GENERAL CONSIDERATION

Editor's Note. — The 1955 amendment added the last sentence.

For comment on the present and future use of the writ of recordari in North Carolina, see 2 Wake Forest Intra. L. Rev. 77 (1966).

As to form for writ of recordari, see 2 Wake Forest Intra. L. Rev. 88 (1966).

Cited in Edwards v. Edwards, 261 N.C. 445, 135 S.E.2d 18 (1964).

IV. DISMISSAL FOR FAILURE TO DOCKET—RECORDARI

Laches in Applying for Recordari.—

In accord with original. See Clements v. Booth, 244 N.C. 474, 94 S.E.2d 365 (1956).

§ 1-300. Appeal from justice docketed for trial de novo.

Duty of Appellant to See Case Properly Docketed.—

In accord with original. See Clements v. Booth, 244 N.C. 474, 94 S.E.2d 365 (1956).

SUBCHAPTER X. EXECUTION

Article 28

Execution

§ 1-302. Judgment enforced by execution.

Cited in Safeco Ins. Co. of America v. Nationwide Mut. Ins. Co., 264 N.C. 749, 142 S.E.2d 694 (1965).

§ 1-303. Kinds of; signed by clerk; when sealed.

Execution on Certificate of Commissioner of Revenue.—See note to § 1-307.

§ 1-305. Clerk to issue, in six weeks; penalty. The clerk of the superior court shall issue executions on all unsatisfied judgments rendered in his court, which are in full force and effect, upon the request of any party or person entitled thereto and upon payment of the necessary fees; provided, however, that the clerks of the superior court shall issue executions on all judgments rendered in their respective courts on forfeiture of bonds in criminal cases within six weeks of the rendition of the judgment, without any request or any advance payment of fees. Every clerk who fails to comply with the requirements of this section is liable to be amerced in the sum of one hundred dollars for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs, and is further liable to the party injured by suit upon his bond. (1850, c 17 ss 1, 2, 3, R C c 45, s 29. Code, s 470. Rev., s 618; C S., s 666; 1953. c. 470; 1959. c. 1295.)

Editor's Note. – The 1953 amendment rewrote the former first two sentences to appear as the present first sentence For comment on amendment, see 31 N C Law Rev 397

The 1959 amendment substituted "rendered" for "docketed" in line two.

§ 1-306. Enforcement as of course.

Procedure for Obtaining New Judgment. Under the proviso in this section no execution upon any judgment for money may be issued after 10 years of the date of the rendition thereof. and the only procedure whereby the owner of the judgment may obtain a new judgment for the amount is by independent action upon the judgment, commenced by the issuance of summons, filing of complaint, service thereof, etc., as in case of any other action to recover judgment on debt, which action must, under § 1-47 be commenced within 10 years from the date of the rendition of the judgment. Reid v. Bristol, 241 N.C. 699, 86 S.E.2d 417 (1955).

The concept of a dormant judgment and scire facias for leave to issue execution thereon is now obsolete. Reid v Bristol. 241 N.C. 699, 86 S.E.2d 417 (1955).

§ 1-307. Issued from and returned to court of rendition.

May Issue Only from Court Rendering Judgment.—

In accord with original See Daniels v. Yelverton, 239 N.C. 54, 79 S.E.2d 311 (1953).

Execution on Certificate of Commissioner of Revenue.—Where the Commissioner of Revenue has the clerk of a superior court docket his certificate setting forth the tax due by a resident of the county pursuant to § 105-242(3), execution on such judgment directed to the sheriff of the county must be issued by the clerk of the superior court of the county, or in his name by a deputy or assistant clerk, and it cannot be issued by the Commissioner of Revenue. Daniels v. Yelverton, 239 N.C. 54, 79 S.E.2d 311 (1953).

§ 1-308 To what counties issued. – When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. No execution may issue from the superior court upon any judgment until such judgment shall be docketed in the county to which the execution is to be issued. When it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Execution may be issued at the same time to different counties. (C. C. P., s. 259; 1871-2, c. 74; 1881, c. 75; Code, s. 443; 1905. c. 412; Rev., s 622 C S., s 670. 1953. c. 884.)

Editor's Note. –

The 1953 amendment, effective July 1. 1953, rewrote the second sentence.

§ 1-310. When dated and returnable. – Executions shall be dated as of the day on which they were issued, and shall be returnable to the court from which they were issued not more than ninety days from said date, and no executions against property shall issue until the end of the term during which judgment was rendered. (1870-1, c. 42, s. 7; 1873-4, c. 7; Code s. 449; 1903, c. 544; Rev. s 624. C S., s 672; 1927. c. 110; 1931, c 172; 1953 c 697.)

Editor's Note –

The 1953 amendment struck out the words "less than forty nor," which formerly appeared between the words "not" and "more" in line three. For comment on amendment, see 31 N.C.L. Rev. 397 (1953).

The term "return" implies that the process is taken back, with such endorsements as the law requires, to the place from which it originated. Brogden Prod. Co. v. Stanley, 267 N.C. 608, 148 S.E.2d 689 (1966).

§ 1-311. Against the person.

General Doctrine.—

If a judgment is rendered against a defendant for a cause of action specified in § 1-410 (1), this section authorizes an execution against the person of the judgment debtor after the return of an execution against his property wholly or partly unsatisfied. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Three Classes of Cases Contemplated.—

This section contemplates three classes whereby execution may be had on the body: (1) Where the cause of arrest does not appear in the complaint, but appears by affidavit; (2) where the cause of arrest is set forth in the complaint, but is based on facts which are collateral and extrinsic to plaintiff's cause of action; and (3) where the facts showing the cause of arrest as set forth in the complaint are the same or essential to those on which plaintiff bases his cause of action. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Necessity for Sufficient Allegations.—An essential prerequisite to plaintiff's right to body execution is that, where there has not already been a lawful arrest under § 1-410, the complaint or affidavit must allege such facts as would have justified an order for such arrest. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Necessity of Recovery of Judgment.—

An execution against the person cannot issue simply because of allegations in the complaint. The facts alleged entitling the plaintiff to such an execution must be passed upon and must enter into the judgment. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Effect of execution.—The effect of an execution against the person is to deprive the defendant in the execution entirely of his homestead exemption and of any personal property exemption over and above fifty dollars. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Privilege against Self-Incrimination Inapplicable Where Remedy under This Section Relinquished.—In an action for malicious assault, if plaintiff seeks merely compensatory damages, and relinquishes all claim to punish defendants by punitive damages and to arrest them by virtue of the provisions of § 1-410 (1) and to issue an execution against their persons by virtue of the provisions of this section, defendants' claim of privilege against self-incrimination does not apply. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Discharge, etc.—

When a person is taken by authority of an execution against his person by virtue of the provisions of this section, he can be discharged from imprisonment only by payment or giving notice and surrender of all his property in excess of fifty dollars as provided in § 23-23 and §§ 23-30 through 23-38. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

The provisions of § 23-29 (2) are broad and strong, and plainly extend to and embrace every person who may be arrested by virtue of an order of arrest issued pursuant to the provisions of § 1-410, and also extend to and embrace every person who has been seized by virtue of an execution against his person by authority of the provisions of this section. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

§ 1-313. Form of execution.

Liens on Real Estate and Personalty Distinguished.—A judgment creditor acquires a lien on the judgment debtor's real estate by docketing. But he acquires no lien on the personalty until there has been a valid levy. Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962).

To make a valid levy the officer must be armed with judicial process and he must act in conformity with the direction given him in the execution or other judicial order. Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962).

Duty to Report Levy on Automobile.—When a levy has been made on an automobile pursuant to an execution, it is now the duty of the officer to report the levy to the Department of Motor Vehicles in a form prescribed by it. The levy so reported is subordinate to all liens theretofore noted on the certificate by the Department. Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962).

§ 1-315. Property liable to sale under execution; bill of sale.—(a) The following property of the judgment debtor, not exempted from sale under the Constitution and laws of this State, may be levied on and sold under execution:

(1) Goods, chattels, and real property belonging to him.

(2) Leasehold estates of three years duration or more owned by him.
(3) Equitable and legal rights of redemption in personal and real property pledged or mortgaged by him, or transferred to a trustee for security by him.
(4) Real property or goods and chattels of which any person is seized or possessed in trust for him.
(5) Choses in action represented by instruments which are indispensable to the chose in action.
(6) Choses in action represented by indispensable instruments, which are secured by any interest in property, together with the security interest in property.
(7) Interests as vendee under conditional sales contracts of personal property.

(b) Upon the sale under execution of any property or interest for which no provision is otherwise made under this article for the furnishing of a deed or other instrument of title, the officer holding the sale shall execute and deliver to the purchaser a bill of sale.

(c) No execution shall be levied on growing crops until they are matured. (5 Geo. II, c. 7, s. 4; 1777, c. 115, s. 29, P. R.; 1812, c. 830, ss. 1, 2, P. R., 1822, c. 1172, P. R.; 1844, c. 35; R. C., c. 45, ss. 1-5, 11; Code, ss. 450, 453; Rev., ss. 629, 632; 1919, c. 30; C. S., s. 677; 1961, c. 81.)

Cross Reference.—See note to § 1-440.4.

Editor's Note.—The 1961 amendment, effective July 1, 1961, enlarged the kinds of property subject to sale under execution and added the provision for a bill of sale.

Only property of the judgment debtor may be levied on and sold under execution. A levy made on property of a person other than the judgment debtor constitutes a trespass. Mica Indus., Inc. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

Applicable to Passive Trusts.—The provisions of subsection (4) of this section and § 1-316 do not apply to an active trust. Cornelius v. Albertson, 244 N.C. 265, 93 S.E.2d 147 (1956).

The common-law rule that only property of which the judgment debtor has legal title is subject to sale under execution has been enlarged by statute to include property held for the benefit of the judgment debtor in a passive trust, but even so, the trustee must be brought in by supplemental proceeding under G.S. 1-360 et seq. Cornelius v. Albertson, 244 N.C. 265, 93 S.E.2d 147 (1956).

Applied in Grabenhofer v. Garrett, 260 N.C. 118, 131 S.E.2d 675 (1963).

Cited in Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966).

§ 1-316. Sale of trust estates; purchaser's title.

Cross Reference.—See note to § 1-315.

Application to Certain Trusts Only.—In accord with original. See Cornelius v. Albertson, 244 N.C. 265, 93 S.E.2d 147 (1956).

§ 1-324.1. Judgment against corporation; property subject to execution.—If a judgment is rendered against a corporation, the plaintiff may sue out such executions against its property as is provided by law to be issued against the property of natural persons, which executions may be levied as well on the current money as on the goods, chattels, lands and tenements of such corporation. (1901, c. 2, s. 66, Rev., s. 1212; C. S., s. 1201; 1955, c. 1371, s. 2.)

Editor's Note.—Session Laws 1955, c. 1371, s. 2, effective July 1, 1957, transferred former G.S. 55-140 through 55-146 to appear as this and the six following sections. Until said date they were effective as article 12 of chapter 55 of the General Statutes.

§ 1-324.2. Agent must furnish information as to corporate officers and property.—Every agent or person having charge or control of any property of the corporation, on request of a public officer having for service a writ of execution against it, shall furnish to him the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, so far as he has knowledge of the same. (1901, c. 2, s. 67; Rev., s. 1213; C. S., s. 1202; 1955, c. 1371, s. 2.)

§ 1-324.3. Shares subject to execution; agent must furnish information.—Any share or interest in any bank, insurance company, or other joint stock company, that is or may be incorporated under the authority of this State, or incorporated or established under the authority of the United States, belonging to the defendant in execution, may be taken and sold by virtue of such execution in the same manner as goods and chattels. The clerk, cashier or other officer of such company who has at the time the custody of the books of the company shall, upon being shown the writ of execution, give to the officer having it a certificate of the number of shares or amount of the interest held by the defendant in the company; and if he neglects or refuses to do so, or if he wilfully gives a false certificate, he shall be liable to the plaintiff for the amount due on the execution, with costs. (1901, c. 2, ss. 69, 70; Rev., ss. 1214, 1215; C. S., s. 1203; 1955, c. 1371, s. 2.)

§ 1-324.4. Debts due corporation subject to execution; duty, etc., of agent.—If an officer holding an execution is unable to find other property belonging to the corporation liable to execution, he or the judgment creditor may elect to satisfy such execution in whole or in part out of any debts due the corporation, and it is the duty of any agent or person having custody of any evidence of such debt to deliver it to the officer, for the use of the creditor and such delivery, with a transfer to the officer in writing, for the use of the creditor and notice to the debtor, shall be a valid assignment thereof; and the creditor may sue for and collect the same in the name of the corporation, subject to such equitable set-offs on the part of the debtor as in other assignments. Every agent or person who neglects or refuses to comply with the provisions of this section and G. S. 1-324.2 is liable to pay to the execution creditor the amount due on the execution, with costs. (1901, c. 2, s. 68; Rev., s. 1216; C. S., s. 1204; 1955, c. 1371, s. 2.)

The term "debts" is used in this section in a restricted sense. Any agent or person having custody must deliver any evidence of such debt to the officer with a transfer to the officer in writing, and notice to the creditor shall be a valid assignment thereof. Nothing in the statute gives authority to a creditor to maintain an action in the name of the corporation for the recovery of damages for tortious breach of trust by officers in their dealings with the corporation. Caldlaw, Inc. v. Caldwell, 248 N.C. 235, 102 S.E.2d 829 (1958), construing former § 55-143.

And Does Not Include Unliquidated Claim for Damages for Breach of Trust.—A judgment creditor of a corporation whose judgment is unsatisfied may bring suit in the name of the corporation only for the purpose of collecting a debt due the corporation for the satisfaction of his claim, and an unliquidated claim against an officer of the corporation to recover damages for tortious breach of trust by such officer in his dealings with the corporation arises ex delicto and is an action in tort, and the statute does not authorize a judgment creditor to maintain such suit in the name of the corporation against such officer. Caldlaw, Inc. v. Caldwell 248 N.C. 235, 102 S.E.2d 829 (1958), construing former § 55-143.

§ 1-324.5. Violations of three preceding sections misdemeanor. — If any agent or person having charge or control of any property of a corporation, or any clerk, cashier, or other officer of a corporation, who has at the time the custody of the books of the company, or if any agent or person having custody of any evidence of debt due to a corporation, shall, on request of a public officer having in his hands for service an execution against the said corporation, wilfully refuse to give to such officer the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, or shall wilfully refuse to give to such officer a certificate of the number of shares, or amount of interest held by such corporation in any other corporation, or shall wilfully refuse to deliver to such officer any evidence of indebtedness due or to become due to such corporation, he shall be guilty of a misdemeanor. (1901, c. 2, ss. 67, 68, 70; Rev., s. 3690; C. S., s. 1205; 1955, c. 1371, s. 2.)

§ 1-324.6. Proceedings when custodian of corporate books is a nonresident.—When the clerk, cashier, or other officer of any corporation incorporated under the laws of this State, who has the custody of the stock-registry books, is a nonresident of the State, it is the duty of the sheriff receiving a writ of execution issued out of any court of this State against the goods and chattels of a defendant in execution holding stock in such company to send by mail a notice in writing, directed to the nonresident clerk, cashier, or other officer at the post office nearest his reputed place of residence, stating in the notice that he, the sheriff, holds the writ of execution, and out of what court, at whose suit, for what amount, and against whose goods and chattels the writ has been issued, and that by virtue of such writ he seizes and levies upon all the shares of stock of the company held by the defendant in execution on the day of the date of such written notice. It is also the duty of the sheriff on the day of mailing the notice to affix and set upon any office or place of business of such company, within his county, a like notice in writing, and on the same day to serve like notice in writing upon the president and directors of the company, or upon such of them as reside in his county, either personally or by leaving the same at their respective places of abode. The sending, setting up, and serving of such notices in the manner aforesaid constitute a valid levy of the writ upon all shares of stock in such company held by the defendant in execution, which have not at the time of the receipt of the notice by the clerk, cashier, or other officer, who has custody of the stock-registry books, been actually transferred by the defendant, and thereafter any transfer or sale of such shares by the defendant in execution is void as against the plaintiff in the execution, or any purchaser of such stock at any sale thereunder. (1901, c. 2, s. 71; Rev., s. 1217; C. S., s. 1206; 1955, c. 1371, s. 2.)

§ 1-324.7. Duty and liability of nonresident custodian.—The nonresident clerk, cashier, or other officer in such corporation, to whom notice in writing is sent as prescribed in G. S. 1-324.6, shall send forthwith to the officer having the writ, a statement of the time when he received the notice and a certificate of the number of shares held by the defendant in the corporation at the time of the receipt, not actually transferred on the books of the corporation, and the sheriff, or other officer, on receipt by him of this certificate, shall insert the number of shares in the inventory attached to the writ. If the clerk, cashier, or other officer in such corporation neglects to send the certificate as aforesaid or wilfully sends a false one, he is liable to the plaintiff for double the amount of damages occasioned by his neglect, or false certificate, to be recovered in an action against him, but the neglect to send, or miscarriage of the certificate, does not impair the validity of the levy upon the stock. (1901, c. 2, s. 72; Rev., s. 1218; C. S., s. 1207; 1955, c. 1371, s. 2.)

ARTICLE 29A

Judicial Sales.

Part 1. General Provisions.

§ 1-339.1. Definitions.

Cross References.—As to execution sales, see §§ 1-339.41 to 1-339.71. As to sales under power of sale, see §§ 45-21.1 to 45-21.33.

Cited in Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 141 S.E.2d 329 (1965).

§ 1-339.3a. Judge or clerk may order public or private sale.—The judge or clerk of the superior court having jurisdiction has authority in his discretion to determine whether a sale of either real or personal property shall be a public or private sale. Any private sale conducted under an order issued prior to July 1, 1955 by a judge or clerk of the superior court having jurisdiction is hereby validated as to the order that such sale be a private sale. (1955, c. 74.)

Editor's Note.—The act inserting this section became effective July 1, 1955

§ 1-339.8. Public sale of separate tracts in different counties.

(d) When real property is sold in a county other than the county where the proceeding, in which the sale was ordered, is pending, the person authorized to hold the sale shall cause a certified copy of the order of confirmation to be recorded in the office of the register of deeds of the county where such property is situated, and it shall not be necessary for the clerk of court to probate said certified copy of the order of confirmation. (1949, c. 719, s. 1; 1965, c. 805.)

Editor's Note. — The 1965 amendment substituted "order of confirmation" for "order of sale" in subsection (d) and added the language following "situated" in that subsection

As the rest of the section was not affected by the amendment, it is not set out

Part. 2. Procedure for Public Sales of Real and Personal Property.

§ 1-339.17. Public sale; posting and publishing notice of sale of real property.—(a) The notice of public sale of real property shall

(1) Be posted, at the courthouse door in the county in which the property is situated, for thirty days immediately preceding the sale,

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least four successive weeks, but

b. If no such newspaper is published in the county, then notice shall be published once a week for at least four successive weeks in a newspaper having a general circulation in the county.

(b) When the notice of public sale is published in a newspaper,

(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than twenty-two days, including Sundays, and

(2) The date of the last publication shall be not more than 10 days preceding the date of the sale

(1965, c. 41; 1967, c. 979, s. 1.)

Editor's Note.— Prior to the 1965 amendment, effective Sept. 1, 1965, paragraph b of subdivision (2) of subsection (a) provided for posting the notice at three other public places in the county.

The 1967 amendment, effective Oct. 1, 1967, substituted "be not more than 10" for "not be more than seven" in subdivision (2) of subsection (b).

As only subsections (a) and (b) were changed by the amendments, the rest of the section is not set out.

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

Person Interested in Notices Is Invitee. —A person interested in notices posted in the courthouse pursuant to this section is not a mere licensee but an invitee when on the courthouse premises. Walker v County of Randolph, 251 N.C. 805, 112 S.E.2d 551 (1960).

§ 1-339.25. Public sale; upset bid on real property; compliance bond.—(a) An upset bid is an advanced, increased or raised bid whereby a person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten percent (10%) of the first $1000 thereof plus five percent (5%) of any excess above $1000, but in any event with a minimum increase of $25, such increase being deposited in cash, or by certified check or cashier's check satisfactory to the said clerk, with the clerk of the superior court, with whom the report of the sale was filed, within ten days after the filing of such report; such deposit to be made with the clerk of superior court before the expiration of the tenth day, and if the tenth day shall fall upon a Sunday or holiday, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made on the day following when said office is open for the regular dispatch of its business. An upset bid need not be in writing, and the timely deposit with the clerk of the required amount, together with an indication to the clerk as to the sale to which it is applicable, is sufficient to constitute the upset bid, subject to the provisions of subsection (b).

(1963, c. 858; 1967, c. 979, s. 1.)

Editor's Note. — The 1963 amendment, effective Jan. 1. 1964, inserted the part of the first sentence of subsection (a) that follows the semicolon. As only this subsection was affected by the amendment the rest of the section is not set out.

The 1967 amendment, effective Oct. 1, 1967, inserted "or by certified check or cashier's check satisfactory to the said clerk" in the first sentence of subsection (a).

As only subsection (a) was affected by the amendments, the rest of the section is not set out.

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

Upset Bid to Be in Amount Specified.— An upset bid in a private sale of real property shall be submitted to the court within ten days after the filing of the report of sale, and shall be in an amount specified by this section. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Discretion of Court. — Whether to accept a cash bid or order another sale, thus releasing the cash bidder, calls for the exercise of judicial discretion and the refusal to order another sale upon an upset bid of the owners of the minority interest in the land, secured not by cash or bond, but only by their interest in the land which was subject to liens in an undisclosed amount, will be affirmed as a proper exercise of judicial discretion by the court Galloway v. Hester, 249 N.C. 275, 106 S.E.2d 241 (1958).

Advance Bid Held Not to Meet Requirements of Section. — An advance bid entered by the owners of a minority interest in the land and not supported by a cash deposit or bond but only by the interest of the advance bidders in the land, which interests are subject to deeds of trust, judgments and tax liens in an undisclosed amount, does not meet, at least technically, the requirements of this section for an advance bid. Galloway v. Hester, 249 N.C. 275, 106 S.E.2d 241 (1958).

Quoted in Pike v. Wachovia Bank & Trust Co., 274 N.C. 1, 161 S.E.2d 453 (1968).

§ 1-339.27. Public sale; resale of real property; jurisdiction; procedure.

Upon the filing of an upset bid under § 1-339.36 (a), this section applies, and to all intents and purposes the sale thereafter becomes a public sale and is subject to the statutory requirements of resale. Wadsworth v. Wadsworth, 260 N.C. 702 133 S.E.2d 681 (1963).

When an upset bid in a private sale is submitted to the court, a resale shall be ordered; a notice of the resale shall be posted at the courthouse door for fifteen days immediately preceding the sale and published in a newspaper once a week for two successive weeks. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Quoted in Pike v. Wachovia Bank & Trust Co., 274 N.C. 1, 161 S.E.2d 453 (1968).

§ 1-339.28. Public sale; confirmation of sale.

The power of a guardian to make disposition of his ward's estate is very carefully regulated, and the sale is not allowed except by order of court, which order must have the supervision, approval and confirmation of the resident judge of the district or the judge regularly holding the courts of the district. Pike v. Wachovia Bank & Trust Co., 274 N.C. 1, 161 S.E.2d 453 (1968).

When a guardian of an incompetent person sells real property under order of court, he is merely an agent of the court and the sale is not consummated until it is confirmed by the resident judge or the judge regularly holding courts in the district. (When the sale is originally ordered by the clerk, his confirmation is also required.) This confirmation represents the consent of the court and is granted or refused in the discretion of the court. Pike v. Wachovia Bank & Trust Co., 274 N.C. 1, 161 S.E.2d 453 (1968).

Stated in North Carolina State Highway Comm'n v. Moore, 3 N.C. App. 207, 164 S.E.2d 385 (1968).

§ 1-339.30. Public sale; failure of bidder to make cash deposit or to comply with bid; resale.

The doctrine of caveat emptor applies to a judicial sale, and while the court has equity jurisdiction to protect the purchaser from imposition because of fraud or mistake, when the evidence discloses that the parties had equal opportunity to discover the facts, that the description set out in the petition for sale was of record for more than a year prior to the bid, and that the purchaser was familiar with the property and did not ask for a survey, such purchaser may not seek relief from his bid on the ground of shortage in acreage or lack of access to the property. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

Tender of Deed.—The commissioner is required by this section to tender a deed for the property or make a bona fide attempt to tender such deed. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

Where the highest bidder was served with notice on 27 June 1966 that the commissioner would move on 12 July 1966 that the highest bidder comply with the terms of sale, this indicated that the commissioner, who was under order of court to convey upon receipt of purchase price, stood ready, willing and able to comply with the terms of the order. No further tender was necessary when the bidder failed to comply, since the law does not require the doing of a vain thing. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

Order Held Not a Void Conditional Judgment.—Order issued in a judicial sale proceeding that, upon refusal of the last and highest bidder to comply with his bid, the land should be resold and that the defaulting bidder be held liable for the costs and for any amount that the final sale price is less than his bid, is not a void conditional judgment, since it is unequivocal and the determination of the liability is a simple matter of arithmetic and an administrative duty, and such order is a final judgment deciding the matter on its merits without need for futher direction of the court. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

Part 3. Procedure for Private Sales of Real and Personal Property.

§ 1-339.33. Private sale; order of sale.

Discretion, etc.—

Under the former statute, the court having jurisdiction might, in the exercise of its discretion, order a sale of land where minors were interested and represented by guardian ad litem, either at public or private sale. The court has similar discretion under this section. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Section does not specify conditions under which a private sale may be ordered. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Hence, it is a discretionary matter for the court in a particular case. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Court May Lay Down Guide Lines and Give Directions.—There is nothing in this section which restricts the court in laying down guide lines and giving directions for the making of a private sale in the first instance. Indeed, it is the duty of the court to give directions to the commissioner. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Sale of Timber.—In the sale of large bodies of timber, a commissioner, if permitted to sell privately, has freedom to canvass prospective buyers, give time for viewing and estimating the timber, and negotiate directly with prospects without being restricted by the formal requirements of a public sale. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

§ 1-339.36. Private sale; upset bid; subsequent procedure.

Every Private Sale Is Subject to Upset Bids.—Every private sale of real property under order of the court is subject to upset bids. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Upon the filing of an upset bid under subsection (a), § 1-339.27 (a) applies, and to all intents and purposes the sale thereafter becomes a public sale and is subject to the statutory requirements of resale. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

When an upset bid in a private sale is submitted to the court, a resale shall be ordered, a notice of the resale shall be posted at the courthouse door for fifteen days immediately preceding the sale, and published in a newspaper once a week for two successive weeks. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Section 1-339.25 Also Applies.—An upset bid in a private sale of real property shall be submitted to the court within ten days after the filing of the report of sale, and shall be in an amount specified by § 1-339.25. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

ARTICLE 29B.

Execution Sales.

Part 1. General Provisions.

§ 1-339.41. Definitions.

Cross References.—As to judicial sales, see §§ 1-339.1 to 1-339.40. As to sales under power of sale, see §§ 45-21.1 to 45-21.33.

Part 2 Procedure for Sale.

§ 1-339.51. Contents of notice of sale.

Statutes Contemplate Sale at Fair Value. The statutes regulating execution sales contemplate a sale at which the thing sold will bring its fair value Pittsburgh Plate Glass Co. v. Forbes, 258 N.C. 426, 128 S.E.2d 875 (1963).

§ 1-339.52. Posting and publishing notice of sale of real property.—(a) The notice of sale of real property shall

(1) Be posted, at the courthouse door in the county in which the property is situated, for thirty days immediately preceding the sale,

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least four successive weeks; but

b. If no such newspaper is published in the county, then notice shall be published once a week for at least four successive weeks in a newspaper having general circulation in the county.

(b) When the notice of sale is published in a newspaper,

(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than twenty-two days, including Sundays, and

(2) The date of the last publication shall be not more than 10 days preceding the date of the sale.

(c) When the real property to be sold is situated in more than one county, the provisions of subsections (a) and (b) shall be complied with in each county in which any part of the property is situated. (1949, c. 719, s. 1; 1967, c. 979, s. 2.)

Editor's Note.—The 1967 amendment, effective Oct. 1, 1967, rewrote paragraph b in subdivision (2) of subsection (a) and substituted "be not more than 10" for "not be more than seven" in subdivision (2) of subsection (b).

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

§ 1-339.54. Notice to judgment debtor of sale of real property.

Effect of Noncompliance. — A failure to comply with this section, which is directory, will not render the sale void as against a stranger without notice of the irregularity, nor can it be assailed collaterally, but in such a case the defendant may, on motion, or by direct proceeding, have the sale vacated. Walston v. W.H. Applewhite & Co., 237 N.C. 419, 75 S.E.2d 138 (1953).

§ 1-339.64. Upset bid on real property; compliance bond.—(a) An upset bid is an advanced, increased or raised bid whereby a person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten percent (10%) of the first $1000 thereof plus five percent (5%) of any excess above $1000, but in any event with a minimum increase of $25, such increase being deposited in cash, or by certified check or cashier's check satisfactory to the said clerk, with the clerk of the superior court, with whom the report of the sale was filed, within ten days after the filing of such report; such deposit to be made with the clerk of superior court before the expiration of the tenth day, and if the tenth day shall fall upon a Sunday or holiday, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made on the day following when said office is open for the regular dispatch of its business. An upset bid need not be in writing, and the timely deposit with the clerk of the required amount, together with an indication to the clerk as to the sale to which it is applicable, is sufficient to constitute the upset bid, subject to the provisions in subsection (b).

(1967, c. 979, s. 2.)

Editor's Note.—The 1967 amendment, effective Oct. 1, 1967, inserted "or by certified check or cashier's check satisfactory to the said clerk" in the first sentence in subsection (a) and added at the end of that sentence the language following the semicolon.

As only subsection (a) was affected by the amendment, the rest of the section is not set out.

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

§ 1-339.67. Confirmation of sale of real property.—No sale of real property may be consummated until the sale is confirmed by the clerk of the superior court. No order of confirmation may be made until the time for submitting an upset bid, pursuant to G.S. 1-339.64, has expired. (1949, c. 719, s. 1; 1967, c. 979, s. 2.)

Editor's Note.—The 1967 amendment, effective Oct. 1, 1967, substituted "G.S. § 1-339.64" for "G.S. § 1-339.65."

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

When Clerk May Decline to Confirm Sale. — If competitive bidding is stifled, resulting in a bid less than the fair value of the property sold, the clerk may decline to confirm the sale. Pittsburgh Plate Glass Co. v. Forbes, 258 N.C. 426, 128 S.E.2d 875 (1963).

The high bidder acquires no right until his bid is accepted, and the sale confirmed. Pittsburgh Plate Glass Co. v. Forbes, 258 N.C. 426, 128 S.E.2d 875 (1963).

Doctrine of Caveat Emptor.—While the doctrine of caveat emptor applies to purchasers at execution sales, it does not tie the hands of a court to prevent a manifest injustice not due to the fault or neglect of the purchaser. Pittsburgh Plate Glass Co. v. Forbes, 258 N.C. 426, 128 S.E.2d 875 (1963).

Applied in Priddy v. Kernersville Lumber Co., 258 N.C. 653, 129 S.E.2d 256 (1963).

§ 1-339.68. Deed for real property sold; property subject to liens; orders for possession.

(c) Orders for possession of real property sold pursuant to this article, in favor of the purchaser and against any party or parties in possession at the time of the sale who remain in possession at the time of application therefor, may be issued by the clerk of the superior court of the county in which such property is sold, when:

(1) The purchaser is entitled to possession, and

(2) The purchase price has been paid, and

(3) The sale or resale has been confirmed, and

(4) Ten days' notice has been given to the party or parties in possession at the time of the sale or resale who remain in possession at the time application is made, and

(5) Application is made to such clerk by the purchaser of the property. (1949, c. 719, s. 1; 1967, c. 979, s. 2.)

Editor's Note.—The 1967 amendment, effective Oct. 1, 1967, added subsection (c).

As subsections (a) and (b) were not affected by the amendment, they are not set out.

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

Rights and Estate Which May Be Sold.—A sheriff, acting pursuant to an execution, can only sell the rights and estate of the judgment debtor as they existed when the lien pursuant to which he acts became effective. Pittsburgh Plate Glass Co. v. Forbes, 258 N.C. 426, 128 S.E.2d 875 (1963).

Applied in Priddy v. Kernersville Lumber Co., 258 N.C. 653, 129 S.E.2d 256 (1963).

§ 1-339.69. Failure of bidder to comply with bid; resale.

Action by Execution Debtor against Defaulting Bidder.—If the amount bid is less than the amount of the debt, so that the execution debtor is entitled to no part of the price, the execution debtor is not entitled to bring an action to enforce the bid against a defaulting bidder, notwithstanding subsection (d) of this section, and the action is properly brought by the sheriff. Daniels v. Yelverton, 239 N.C. 54, 79 S.E.2d 311 (1953).

§ 1-339.71. Special proceeding to determine ownership of surplus.

—(a) A special proceeding may be instituted before the clerk of the superior court by any person claiming any money, or part thereof, paid into the clerk's office under G.S. 1-339.70 or G.S. 105-391, to determine who is entitled thereto.

(1967, c. 705, s. 2.)

Editor's Note.—The 1967 amendment inserted the reference to § 105-391 in subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

ARTICLE 29C.

Validating Sections.

§ 1-339.72. Validation of certain sales. — All sales of real property under execution, deed of trust, mortgage or other contracts made since February 21, 1929, where notice of the original sale was published for four successive weeks, and notice of any resale was published for two successive weeks, shall be and the same are in all respects validated as to publication of notice. (1933, c. 96, s. 3; 1949, c. 719, s. 3; 1955, c. 1286; 1965, c. 786.)

Local Modification.—Nash: 1955, c. 1075

Editor's Note. —

The 1955 amendment inserted the first two references to notice.

The 1965 amendment re-enacted this section without change.

§ 1-339.77. Validation of certain sales confirmed prior to time prescribed by law —From and after June 1, 1953 no action shall be brought to contest the validity of a decree filed on or before December 31, 1950, confirming the sale of real or personal property in any special proceeding on the grounds that the decree of confirmation was entered prior to the expiration of the period of time as required by law following the report of sale. (1953, c. 1089.)

ARTICLE 30.

Betterments.

§ 1-340. Petition by claimant; execution suspended; issues found.

Editor's Note.—For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969). For an article on trespass to land in North Carolina, see 47 N.C.L. Rev. 31 (1968).

An action under this section is not the same as an action for unjust enrichment. Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966).

This section creates no independent cause of action. It merely declares that the owner of land who recovers it has no just claim to anything but the land itself and a fair compensation for being kept out of possession, and if it has been enhanced in value by improvements made by another under the belief that he was the owner, the true owner ought not to take the increased value without some compensation to the other. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

The right under this section is a defensive right. Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966).

It Accrues When Owner Seeks to Enforce Right to Possession. — The right under this section accrues when an owner of the land seeks and obtains the aid of the court to enforce his right to possession. Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966).

The claim accrues when the owner seeks and obtains the aid of the court to enforce his right of possession. The law awards to the owner the land and his rents and to the occupant the value of his improvements. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

Owner Must Have Obtained Judgment Entitling Him to Eject Occupant. — The wording of this section clearly limits its application to possessory actions or actions in which the final judgment may be enforced by execution in the nature of a writ of possession or writ of assistance. And the right to claim compensation does not arise until the owner of a superior title asserts his right of possession and obtains a judgment which entitles him to eject the occupant—though the last sentence of this section would seem to permit the defendant to assert his claim in his answer and have an issue directed thereto submitted to the jury on the trial of the main issue. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

No Claim against Remaindermen Until Falling in of Life Estate.—Where remaindermen had a tax foreclosure set aside to the extent that the tax deed purported to convey the remainder, but the conveyance of the life estate by the tax foreclosure was not affected, persons in possession under the tax foreclosure were not entitled to file claim for betterments against the remainderman until the falling in of the life estate and the assertion of the right to immediate possession by the remainderman. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

Claim Cannot Defeat Plaintiff's Title.— In accord with original. See Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

What Claimant Must Show.—This section has been interpreted to impose on claimant the burden of establishing (1) that he made permanent improvements, (2) bona fide belief of good title when the improvements were made, and (3) reasonable grounds for such belief. Pamlico County v. Davis, 249 N.C. 648, 107 S.E.2d 306 (1959).

Evidence Sufficient to Show "Permanent Improvements."—Evidence that the land in question was farm land which had been abandoned and had become a piece of waste-land, and that claimant, by ditching, clearing, building roads and similar work, made it again susceptible of profitable cultivation, is sufficient to show "permanent improvements" within the purview of this section. Pamlico County v. Davis, 249 N.C. 648, 107 S.E.2d 306 (1959).

Color of Title.—

This section applies only where the improvement was constructed by one who was in possession of the land under color of title and who, in good faith and reasonably, believed he had good title to the land. Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966).

Same—Reasonable Belief.—

The basis upon which betterments may be claimed is the finding by the jury that the person in possession, or those under whom he claims, believed at the time of making the improvements and had reason to believe the title good under which he and they were holding the premises. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

Where the grantee knows that his grantor has only a life estate in the lands and nevertheless accepts a deed in form sufficient to convey fee simple title, and makes improvements upon the land, he may not recover for such betterments as against a remainderman, since they were not made under the belief that his color of title to the interest of the remainderman was good. Lovett v. Stone, 239 N.C. 206, 79 S.E.2d 479 (1954).

Separate Claim Should Be Filed by Each Group of Interveners. – This article requires that a claim for betterments be filed in the action in which judgment for land has been rendered. Proper pleading would require each group of interveners to file a separate and distinct claim uncomplicated by reference to the claim of the other. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

Writ of Ouster Should Not Issue Until Judgment for Betterments Is Satisfied. The plaintiff who establishes a superior title is entitled to judgment for the land, but no writ of ouster should issue until defendant's judgment for betterments is satisfied. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

§ 1-341. Annual value of land and waste charged against defendant.

Erroneous Instruction. — Under this section it is error for the court to give a charge which fails to instruct the jury that in making the assessment the use of the improvements made on the premises by the defendant should be excluded. Edwards v. Edwards, 235 N.C. 93, 68 S.E.2d 822 (1952).

§ 1-344. Verdict, judgment, and lien.

Cited in Edwards v. Edwards, 235 N.C. 93, 68 S.E.2d 822 (1952).

§ 1-346. Value of premises without improvements.

The sole question is: How much was the value of the property permanently enhanced estimated as of the time of the recovery of the same, by the betterments put thereon by the labor and expenditure of the bona fide holder of the same? Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

ARTICLE 31

Supplemental Proceedings

§ 1-352. Execution unsatisfied, debtor ordered to answer.

Editor's Note. – For note on supplemental proceedings or creditor's bill in North Carolina, see 35 N.C.L. Rev. 414 (1957).

Applied in Underwood v. Stafford, 270 N.C. 700, 155 S.E.2d 211 (1967).

Cited in Grabenhofer v. Garrett, 260 N.C. 118, 131 S.E.2d 675 (1963).

§ 1-353. Property withheld from execution; proceedings.

Plaintiff need not proceed under this section before he can apply for a receiver under § 1-363. Massey v. Cates, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

Applied in Richard Couture, Inc. v. Rowe, 263 N.C. 234, 139 S.E.2d 241 (1964).

§ 1-360. Debtors of judgment debtor, summoned

Procedure.—

In accord with 1st paragraph in original. See Cornelius v. Albertson, 244 N.C. 265, 93 S.E.2d 147 (1956).

When this section and G. S. 1-362 are read singly or as an integral part of Article 31, Supplemental Proceedings, Chapter 1, Civil Procedure, of the General Statutes, it is manifest that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person at the time of the issuance and service of the order for the examination of the third person, which could not be reached by an execution at law Cornelius v Albertson, 244 N.C. 265, 93 S.E.2d 147 (1956).

Applied in Marx v Maddrey, 106 F Supp. 535 (E.D.N.C. 1952).

Cited in Grabenhofer v. Garrett, 260 N.C. 118, 131 S.E.2d 675 (1963).

§ 1-362. Debtor's property ordered sold.

Cross Reference.—See note to § 1-360

Quoted in Cornelius v. Albertson, 244 N.C. 265, 93 S.E.2d 147 (1956).

§ 1-363. Receiver appointed.

Plaintiff need not proceed under § 1-353 before he can apply for a receiver under this section. Massey v. Cates, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

Reasonable Ground.—

A receiver is appointed almost as of course, where it appears that the judgment debtor has, or probably has, property that ought to be subjected to the satisfaction of the judgment, after the return of the execution unsatisfied. Massey v. Cates, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

To warrant the appointment of a receiver, it need not appear, certainly or conclusively, that the defendant has property that he ought to apply to the judgment—if there is evidence tending in a reasonable degree to show that he probably has such property, this is sufficient; or if it appears probable that he has made a fraudulent conveyance of his property as to his creditors, this is sufficient. Massey v. Cates, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

The receivership operates and reaches out in every direction as an equitable execution, and it is the business of the receiver, under the superintendence of the court, to make it effectual by all proper means. Massey v. Cates, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

SUBCHAPTER XI. HOMESTEAD AND EXEMPTIONS.

ARTICLE 32.

Property Exempt from Execution

§ 1-369. Property exempted.

I. GENERAL CONSIDERATION.

Editor's Note.—

For comment as to whether North Carolina really has a homestead exemption, see 2 Wake Forest Intra. L. Rev. 53 (1966).

§ 1-370. Conveyed homestead not exempt.

History of Section. — See Stokes v Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

Intention of Legislature.—See Stokes v Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

If one is to read this section intelligently, he should read first § 1-371, then § 1-375, and then this section. Stokes v Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

§ 1-371. Sheriff to summon and swear appraisers. — Before levying upon the real estate of any resident of this State who is entitled to a homestead under this article, and the Constitution of this State, the sheriff [or a deputy sheriff designated by the sheriff, and who shall be twenty-one years of age or over], or other officer charged with the levy shall summon three discreet persons qualified to act as jurors, to whom he shall administer the following oath: "I, A. B., do solemnly swear (or affirm) that I have no interest in the homestead exemption of C. D., and that I will faithfully perform the duties of appraiser (or assessor, as the case may be), in valuing and laying off the same. So help me, God." In cases where he deems it necessary he may summon the county surveyor or some other competent surveyor to assist in laying off the homestead by metes and bounds. The portions of this section in brackets shall apply to the following counties only: Alamance, Ashe, Bertie, Brunswick, Buncombe, Cabarrus, Caldwell, Camden, Caswell, Chatham, Chowan, Cumberland, Currituck, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Gates, Graham, Guilford, Halifax, Harnett, Henderson, Hertford, Iredell, Jackson, Johnston, Lenoir, Lincoln, Martin, Mecklenburg, Moore, New Hanover, Onslow, Pasquotank, Perquimans, Pitt, Randolph, Rockingham, Rowan, Sampson, Scotland, Vance, Wayne, Wilson. (1868-9, c. 137, s. 2; Code, s. 502; 1893, c. 58; Rev., s. 687; C. S., s. 730; 1931, c. 58; 1933, cc. 37, 147; 1955, c. 20; 1967, c. 202.)

Editor's Note.—

The 1955 amendment inserted "Chatham" in the list of counties.

The 1967 amendment inserted "Caswell" in the list of counties.

Intention of Legislature. — See Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

Duty of Officer Mandatory.—

This section, by express language, commands the sheriff to lay off a homestead to the judgment debtor before any levy is made. The provisions of the statute are mandatory. Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

Sale under Execution Void for Noncompliance.—Sales made under execution merely for the purpose of providing funds to pay a debt are, when the homestead of the judgment debtor has not been allotted, void. Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

§ 1-372. Duty of appraisers; proceedings on return.

Cited in Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

§ 1-373. Reallotment for increase of value.

Editor's Note. — For comment as to whether North Carolina really has a homestead exemption, see 2 Wake Forest Intra. L. Rev. 53 (1966).

§ 1-375. Levy on excess; return of officer.

Cited in Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

§ 1-376. When appraisers select homestead.

Cited in Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

§ 1-377. Homestead in tracts not contiguous.

Editor's Note. — For comment as to whether North Carolina really has a homestead exemption, see 2 Wake Forest Intra. L. Rev. 53 (1966).

§ 1-379. Appraiser's oath and fees.

Cited in Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

§ 1-386. Allotted on petition of owner.

Cited in Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

§ 1-389. Allotted to widow or minor children on death of homesteader.

Editor's Note. — For comment as to whether North Carolina really has a homestead exemption, see 2 Wake Forest Intra. L. Rev. 53 (1966).

Cited in Elledge v. Welch, 238 N.C. 61, 76 S.E.2d 340 (1953).

SUBCHAPTER XII. SPECIAL PROCEEDINGS.

ARTICLE 33.

Special Proceedings.

§ 1-393. Chapter and Rules of Civil Procedure applicable to special proceedings.—The Rules of Civil Procedure and the provisions of this chapter on civil procedure are applicable to special proceedings, except as otherwise provided. (Code, s. 278; Rev., s. 710; C. S., s. 752; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment added "The Rules of Civil Procedure and" at the beginning of this section.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

A condemnation proceeding is a special proceeding and hence, "except as otherwise provided," the rules respecting procedural notice and the other provisions of the chapter on civil procedure are applicable to a condemnation proceeding. Collins v. North Carolina State Highway & Pub. Works Comm'n, 237 N.C. 277, 74 S.E.2d 709 (1953). See § 40-11.

§ 1-394. Contested special proceedings; commencement; summons.—Special proceedings against adverse parties shall be commenced as is prescribed for civil actions. The summons shall notify the defendant or defendants to appear and answer the complaint, or petition, of the plaintiff within ten days after its service upon the defendant or defendants, and must contain a notice stating in substance that if the defendant or defendants fail to answer the complaint, or petition, within the time specified, plaintiff will apply to the court for the relief demanded in the complaint, or petition. The summons must run in the name of the State, and be dated and signed by the clerk, assistant clerk or deputy clerk of the superior court having jurisdiction in the special proceeding, and be directed to the defendant or defendants, and be delivered for service to some proper person, as defined by Rule 4 (a) of the Rules of Civil Procedure. The clerk shall indicate on the summons by appropriate words that the summons is issued in a special proceeding and not in a civil action. The manner of service, whether by the sheriff or by publication, shall be as is prescribed for summons in civil actions by Rule 4 of the Rules of Civil Procedure: Provided, where the defendant is an agency of the federal government, or an agency of the State, or a local government, or an agency of a local government, the time for filing answer or other plea shall be within thirty (30) days after the date of service of summons or after the final determination of any motion required to be made prior to the filing of an answer. (1868-9, c. 93, s. 4; Code, ss. 279, 287; Rev., ss. 711, 712; C. S., s. 753; 1927, c. 66, s. 5; 1929, c. 50; c. 237, s. 3; 1939, c. 49, s. 2; c. 143; 1951, c. 783; 1961, c. 363; 1967, c. 954, s. 3.)

Editor's Note.—

The 1961 amendment, effective Jan. 1, 1962 deleted the former first proviso.

The 1967 amendment substituted "The summons shall notify the defendant or defendants to appear and answer the complaint" for "The summons shall command the officer to summons the defendant or defendants to appear and answer the complaint" at the beginning of the second sentence, rewrote the third sentence, and substituted "Rule 4 of the Rules of Civil Procedure" for "§ 1-89" in the fifth sentence.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

Cited in Burlington City Bd. of Educ. v. Allen, 243 N.C. 520, 91 S.E.2d 180 (1956).

§ 1-395. Return of summons.—The person to whom the summons is delivered for service shall note on it the day of its delivery to him, and, if required by the plaintiff, shall execute it immediately. When executed, he shall immediately return the summons with the date and manner of its execution, by mail or otherwise, to the clerk of the court issuing it. (C. C. P., s. 75; Code, s. 280; Rev., s. 713; C. S., s. 754; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment substituted "person" for "officer" and "delivered for service" for "addressed."

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

§ 1-399. Defenses pleaded; transferred to civil issue docket; amendments.

Boundary Disputes.—

Where a special proceeding is begun to fix the location of the dividing line between two tracts of land, and defendant, by his answer, puts title to the disputed area in issue by alleging ownership, the proceeding in effect becomes an action to quiet title as provided by § 41-10. When the question of title is raised, the clerk should transfer the proceeding to the superior court in term. Bumgarner v Corpening, 246 N.C. 40, 97 S.E.2d 427 (1957).

Where, in a special proceeding under § 38-1 to establish a boundary line the defendant by his answer denies the petitioner's title and, as a defense, pleads seven years adverse possession under color of title under § 1-38 or twenty years' adverse possession under § 1-40 the proceeding is assimilated to an action to quiet title. In such case, as provided by this section the clerk "shall transfer the cause to the civil issue docket for trial during term upon all issues raised by the pleadings." Lane v. Lane, 255 N.C. 444, 121 S.E.2d 893 (1961).

Ejectment.—

In accord with original. See Murphy v. Smith, 235 N.C. 455, 70 S.E.2d 697 (1952).

Judicial Admission Removing Defense from Field of Issuable Matters.—Where defendants' answer to a petition for partition claimed sole seizin by virtue of an alleged contract under which the ancestor agreed upon a valid consideration to convey or devise the land to defendants, but upon the hearing, defendants admitted that they had no writing to support the alleged agreement to convey or devise, but stated they intended suing for breach of the agreement, the judicial admission effectively removed the defense from the field of issuable matters, since the alleged agreement was void under the statute of frauds, and it was not required that the clerk transfer the issue to the civil docket Clapp v. Clapp, 241 N.C. 281, 85 S.E.2d 153 (1954).

Cited in Dellinger v. Bollinger, 242 N.C. 696, 89 S.E.2d 592 (1955).

§ 1-400. Ex parte; commenced by petition.

Petition Need Not Be Verified. — It is not necessary for a petition in an ex parte proceeding to be verified. Gillikin v. Gillikin, 252 N.C. 1, 113 S.E.2d 38 (1960).

§ 1-401 Clerk acts summarily; signing by petitioners; authorization to attorney.– In cases under § 1-400, if all persons to be affected by the decree or their attorney have signed the petition and are of full age, the clerk of the superior court has power to hear and decide the petition summarily. All of the petitioners must sign the petition, or must sign written application to clerk of court to be made petitioners and file same with the clerk or must sign a written authorization to the attorney which authorization must be filed with the clerk before he may make any order or decree to prejudice their rights. (1868-9, c. 93, s. 2; Code, s. 285; Rev., s. 719; C. S., s. 760; 1953, c. 240.)

Editor's Note. — The 1953 amendment, effective July 1, 1953, rewrote the second sentence which formerly related to filing of written authority from nonresident to attorney.

§ 1-402. Judge approves when petitioner is infant.

Irregularities Render Judgment Voidable But Not Void.—A judgment rendered in an ex parte proceeding approving the compromise and settlement of claims for personal injuries suffered by an infant is not void but only voidable, regardless of how irregular the proceedings may have been. It is binding until set aside by motion in the cause and is not subject to collateral attack. Gillikin v. Gillikin, 252 N.C. 1, 113 S.E.2d 38 (1960).

§ 1-404. Reports of commissioners and jurors.

The provisions of this section are not applicable to a condemnation proceeding, because the statutes bearing directly upon such proceeding prescribe different periods of time for the performance of the several acts enumerated Collins v North Carolina State Highway & Pub. Works Comm'n, 237 N.C. 277, 74 S.E.2d 709 (1953).

§ 1-407. Commissioner holding proceeds of land sold for reinvestment to give bond.—Whenever in any cause or special proceeding there is a sale of real estate for the purpose of a reinvestment of the money arising from such sale, and the proceeds of such sale are held by a commissioner or other officer designated by the court to receive such money for purposes of reinvestment, the commissioner or officer so receiving same shall execute a good and sufficient bond, to be approved by the court, in an amount at least equal to the corpus of the fund, and payable to the State of North Carolina for the protection of the fund and the parties interested therein, and conditioned that such custodian of the money shall faithfully comply with all the orders of the court made or to be thereafter made concerning the handling and reinvestment of said funds and for the faithful and final accounting of the same to the parties interested. (1919 c. 259; C. S., s. 766, 1935 c. 45; 1957, c. 80.)

Editor's Note.—

The 1957 amendment deleted the words "or for any other purpose" formerly appearing after "sale" in line three It also omitted the provisions now constituting G.S. 1-407.2.

Applicability of Section to Trustees. — Where the court decrees a sale of trust property for reinvestment, the trustee should be required to give bond, or other legal provision should be made, to assure the safety of the funds arising from the sale, notwithstanding that the will provides that the trustee should not be required to give bond in administering the trust, since in acting under the decree of the court the trustees act as commissioners of the court and not necessarily as trustees under the will. Blades v Spitzer, 252 N.C. 207, 113 S.E.2d 315 (1960).

Applied in Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967).

§ 1-407.1. Bond required to protect interest of infant or incompetent.—In the case of any sale of real estate the court may, in its discretion, require a good and sufficient bond to protect the interests of any infant or incompetent. (1957, c. 80.)

§ 1-407.2. When court may waive bond; premium paid from fund protected.—The court, in its discretion, may waive the requirement of such bond in those cases in which the court requires the funds or proceeds from such sale to be paid by the purchaser or purchasers directly to the court The premium for any such bond shall be paid from the corpus of the fund intended to be thereby protected (1957 c. 80.)

§ 1-408. Action in which clerk may allow fees of commissioners; fees taxed as costs.

This section sets out the proper procedure for determination of fees to be allowed court-appointed commissioners. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

Section 28-170 Does Not Divest Clerk of Powers under This Section. – Section 28-170 does not divest the clerk of the superior court of the powers and duties expressly committed to him by the provisions of this section with respect to the fees of commissioners appointed for the sale of land as provided therein. Welch v. Kearns, 259 N.C. 367, 130 S.E.2d 634 (1963).

Commissioner Entitled to Review of Order Fixing Compensation.—Since the commissioner is an agent of the court and accountable to it for his actions in connection with the discharge of his duties as commissioner, and entitled to have his compensation fixed as provided by law and taxed as a part of the costs of the proceeding, he is entitled to have an order reviewed which in his opinion has fixed his compensation at less than he in good faith believes his services to be worth. Welch v. Kearns, 259 N.C. 367, 130 S.E.2d 634 (1963).

But He Cannot Interfere in Litigation.—A special commissioner in a chancery cause, or a receiver of the court, is simply an officer of the court, and as such he has no right to intermeddle in questions affecting the rights of the parties, or the disposition of the property in his hands. He cannot interfere in the litigation or ask for the revision of any order or decree affecting the rights of the parties; but when his own accounts or his personal rights are affected, he has the same means of redress that any other party so affected would have. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

Applied in Welch v. Kearns, 261 N.C. 171, 134 S.E.2d 155 (1964).

§ 1-408.1. Clerk may order surveys in civil actions and special proceedings involving sale of land.—In all civil actions and special proceedings instituted in the superior court before the clerk where real property is to be sold to make assets to pay debts, or to be sold for division, or to be partitioned, the clerk may, if, in his opinion, all parties to the action or proceedings will benefit thereby, order a survey of the land involved, appoint a surveyor for this purpose, and fix a reasonable fee for his services, which fee, along with other costs of the survey, shall be taxed as a part of the costs in such action or proceedings. Any dissatisfied party shall have the right of appeal to the judge, who shall hear the same de novo. (1955, c. 373.)

Definition of Boundaries in Judicial Sale of Land. — The court-appointed commissioner to conduct a judicial sale is empowered only to sell the land and distribute the proceeds, and has only such powers as may be necessary to execute the decree of the court, and therefore is not under duty to show the boundaries of the land or the means of ingress and egress to the property, the remedy of a prospective purchaser if he wishes a survey being by motion under this section. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

ARTICLE 34.

Arrest and Bail.

§ 1-409. Arrest only as herein prescribed.

Cited in Brannon v. Wood, 239 N.C. 112, 79 S.E.2d 256 (1953); Reverie Lingerie, Inc. v. McCain, 258 N.C. 353, 128 S.E.2d 835 (1963).

§ 1-410. In what cases arrest allowed. — The defendant may be arrested, as hereinafter prescribed, in the following cases:

(1) In an action for the recovery of damages on a cause of action not arising out of contract where the action is for wilful, wanton, or malicious injury to person or character or for wilfully, wantonly or maliciously injuring, taking, detaining, or converting real or personal property.

(2) In an action for a fine or penalty, for seduction, for money received, for property embezzled or fraudulently misapplied by a public officer, attorney, solicitor, or officer or agent of a corporation or banking association in the course of his employment, or by any factor, agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

(3) In an action to recover the possession of personal property, unjustly de-

tained, where all or any part of the property has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.

(4) When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, in concealing or disposing of the property for the taking, detention or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.

(5) When the defendant has removed, or disposed of his property, or is about to do so, with intent to defraud his creditors. The term "creditors" shall include, but not by way of limitation, a dependent spouse who claims alimony. The term "creditors" shall include, but not by way of limitation, a minor child entitled to an order for support. (1777, c. 118, s. 6, P. R.; R. C., c. 31, s. 54; C. C. P., s. 149; 1869-70, c. 79; Code, s. 291; 1891, c. 541; Rev., s. 727; C. S., s. 768; 1943, c. 543; 1961, c. 82; 1967, c. 1152, s. 6; c. 1153, s. 4.)

Editor's Note.—The 1961 amendment, effective Oct. 1, 1961, deleted from the end of this section the following: "No woman shall be arrested in any action except for a willful injury to person, character or property, and no person shall be arrested on Sunday."

The first 1967 amendment, effective Oct. 1, 1967, added the second sentence in subdivision (5).

The second 1967 amendment, effective Oct. 1, 1967, added the last sentence in subdivision (5).

Effect on Right to Execution against Person. — An essential prerequisite to plaintiff's right to body execution is that, where there has not already been a lawful arrest under this section, the complaint or affidavit must allege such facts as would have justified an order for such arrest. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Execution against Person for Cause Specified in Subdivision (1).—If a judgment is rendered against a defendant for a cause of action specified in subdivision (1) of this section, § 1-311 authorizes an execution against the person of the judgment debtor after the return of an execution against his property wholly or partly unsatisfied. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Privilege against Self-Incrimination Inapplicable Where Remedy under This Section Relinquished.—In an action for malicious assault, if plaintiff seeks merely compensatory damages, and relinquishes all claim to punish defendants by punitive damages and to arrest them by virtue of subdivision (1) of this section and to issue an execution against their persons by virtue of the provisions of § 1-311, defendants' claim of privilege against self-incrimination does not apply. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Discharge of Insolvent Debtor.—The provisions of § 23-29 (2) are broad and strong, and plainly extend to and embrace every person who may be arrested by virtue of an order of arrest issued pursuant to the provisions of this section, and also extend to and embrace every person who has been seized by virtue of an execution against his person by authority of the provisions of § 1-311. Allred v Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Punitive Damages.—For acts under subdivision (1) of this section, when a cause of action is properly alleged and proved and at least nominal damages are recovered by the plaintiff, a jury in its discretion can award punitive damages. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Applied, as to subdivision (1), in Edwards v. Jenkins, 247 N.C. 565, 101 S.E.2d 410 (1958).

Cited in In re Holt, 1 N.C. App. 108, 160 S.E.2d 90 (1968).

§ 1-412. Undertaking before order.

Cited in Edwards v. Jenkins, 247 N.C. 565, 101 S.E.2d 410 (1958).

§ 1-417. Motion to vacate order; jury trial.

Procuring Reduction of Bail Held to Constitute General Appearance.—When a consent order authorizing the reduction of bail as authorized in this section, was signed, defendants invoked the power of the court in their behalf and for their benefit, which constituted a general appearance and waived any defect in connection with the service of process. Reverie Lingerie, Inc. v. McCain, 258 N.C. 353, 128 S.E.2d 835 (1963).

§ 1-419. How defendant discharged.

Applied in Fryar v. Gauldin, 259 N.C. 391, 130 S.E.2d 689 (1963).

§ 1-420. Defendant's undertaking.

Applied in Fryar v. Gauldin, 259 N.C. 391, 130 S.E.2d 689 (1963).

Cited in Capune v. Robbins, 273 N.C. 581, 160 S.E.2d 881 (1968).

§ 1-436. Proceedings against bail by motion.

Applied in Fryar v. Gauldin, 259 N.C. 391, 130 S.E.2d 689 (1963).

ARTICLE 35.

Attachment.

Part 1. General Provisions.

§ 1-440.1. Nature of attachment. — (a) Attachment is a proceeding ancillary to a pending principal action, is in the nature of a preliminary execution against property, and is intended to bring property of a defendant within the legal custody of the court in order that it may subsequently be applied to the satisfaction of any judgment for money which may be rendered against the defendant in the principal action.

(b) No personal judgment, even for costs, may be rendered against a defendant unless personal jurisdiction has been acquired as provided in G.S. 1-75.3.

(c) Although there is no personal service on the defendant, or on an agent for him, and although he does not make a general appearance, judgment may be rendered in an action in which property of the defendant has been attached which judgment shall provide for the application of the attached property, by the method set out in § 1-440.46, to the satisfaction of the plaintiff's claim as established in the principal action. If plaintiff's claim is not thereby satisfied in full, subsequent actions for the unsatisfied balance are not barred. (1947, c. 693, s. 1; 1967, c. 954, s. 3.)

Editor's Note.—

The 1967 amendment substituted the words "personal jurisdiction has been acquired as provided in G.S. 1-75.3" in subsection (b) for former subdivisions (1) and (2) of such subsection, which pertained to personal service and general appearance as prerequisites for a personal judgment.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Applied in Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966).

Cited in Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

§ 1-440.2. Actions in which attachment may be had.—Attachment may be had in any action the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money, or in any action for alimony or for maintenance and support, or an action for the support of a minor child, but not in any other action. (1947, c. 693, s. 1; 1967, c. 1152, s. 4; 1153, s. 3.)

Editor's Note.—

The first 1967 amendment, effective Oct. 1, 1967, eliminated "by a wife" preceding "for alimony."

The second 1967 amendment, effective Oct. 1, 1967, inserted "or an action for the support of a minor child."

Cited in In re Holt, 1 N.C. App. 108, 160 S.E.2d 90 (1968).

§ 1-440.3. Grounds for attachment.

Cross Reference.—As to attachment of goods covered by a negotiable document, see § 25-7-602 and note.

Service of Process.—A resident of the State who has departed with intent to defraud his creditors or to avoid service of process, or a resident who keeps himself concealed in the State with like intent, is amenable to service of process by publication under § 1-98.2 (6). Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Applied in Tyndall v. Tyndall, 270 N.C. 106, 153 S.E.2d 819 (1967); Davenport v. Ralph N. Peters & Co., 386 F.2d 199 (4th Cir. 1967).

Cited in Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

§ 1-440.4. Property subject to attachment.

The bare interest of a creditor in his **chattel security** is not subject to attachment. Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

Any interest an agent may have by reason of the possession of his principal's **property** is not subject to attachment. Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

§ 1-440.6. Time of issuance with reference to summons or service by publication.—(a) The order of attachment may be issued at the time the summons is issued or at any time thereafter.

(b) No order of attachment may be issued in any action after judgment in the principal action is had in the superior court. (1947, c. 693, s. 1; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment substituted the words "at the time the summons is issued or at any time thereafter" in subsection (a) for former subdivisions (1) and (2) of such subsection, which pertained to the time of issuance of the order of attachment.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

§ 1-440.7. Time within which service of summons or service by publication must be had.—(a) When an order of attachment is issued before the summons is served.

(1) If personal service within the State is to be had, such personal service must be had within thirty days after the issuance of the order of attachment;

(2) If such personal service within the State is not to be had,

  a. Service of the summons outside the State, in the manner provided by Rule 4 (j) (1) a or b of the Rules of Civil Procedure, must be had within thirty days after the issuance of the order of attachment, or

  b. Service by publication must be commenced not later than the thirty-first day after the issuance of the order of attachment. If publication is commenced, such publication must be completed as provided by Rule 4 (j) (1) c of the Rules of Civil Procedure unless the defendant appears in the action or unless personal service is had on him within the State.

(b) Upon failure of compliance with the applicable provisions of subsection (a) of this section, either the clerk or the judge shall, upon the motion of the defendant or any other interested party, make an order dissolving the attachment, and the defendant shall have all the rights that would accrue to him under the provisions of § 1-440.45, the same as if the principal action had been prosecuted to judgment and the defendant had prevailed therein. (1947, c. 693, s. 1; 1967, c. 954, s. 3.)

Editor's Note.—

The 1967 amendment substituted "Rule 4 (j) (1) a or b of the Rules of Civil Procedure" for "§ 1-104" in subdivision (2) a of subsection (a), and substituted "Rule 4 (j) (1) c of the Rules of Civil Procedure" for "§ 1-99" in subdivision (2) b of such subsection.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

Failure to Commence Service by Publication within Thirty-One Days.—A defendant is entitled to have an attachment dissolved if plaintiff fails to commence service by publication within thirty-one days after the issuance of the order of attachment. Accident Indem. Ins. Co. v. Johnson, 261 N.C. 778, 136 S.E.2d 95 (1964).

Extension of Time.—

The court has a right to extend the time for service by publication. Thrush v. Thrush, 246 N.C. 114, 97 S.E.2d 472 (1957).

Cited in Bright v. Williams, 245 N.C. 648, 97 S.E.2d 247 (1957).

Part 2. Procedure to Secure Attachment.

§ 1-440.10. Bond for attachment.

Cross Reference.—

See note to § 1-440.12.

When Defendant May Proceed on Bond.—See note to § 1-440.45.

§ 1-440.11. Affidavit for attachment; amendment.

I. IN GENERAL.

Cross Reference.—See note to § 1-440.12.

III. AMENDMENT.

Court Can Allow Amendment.—

The court has discretionary power to permit a plaintiff to amend a defective affidavit upon which warrant of attachment was issued. Thrush v. Thrush, 246 N.C. 114, 97 S.E.2d 472 (1957).

§ 1-440.12. Order of attachment; form and contents.

A clerk's ex parte order of attachment was properly issued under this section if plaintiff's verified complaint and bond for attachment met the requirements of § 1-440.11 and § 1-440.10 respectively. Armstrong v. Aetna Ins. Co., 249 N.C. 352, 106 S.E.2d 515 (1959).

§ 1-440.14. Notice of issuance of order of attachment when no personal service.—(a) When service of process by publication is made subsequent to the original order of attachment, the published and mailed notice of service of process shall include notice of the issuance of the order of attachment.

(b) When the original order of attachment is issued after publication is begun, a notice of the issuance of the order of attachment shall be published once a week for four successive weeks in some newspaper published in the county in which the action is pending, such publication to be commenced within 30 days after the issuance of the order of attachment. Such notice shall show

(1) The county and the court in which the action is pending,

(2) The names of the parties,

(3) The purpose of the action, and

(4) The fact that on a date specified an order was issued to attach the defendant's property.

(c) If no newspaper is published in the county in which the action is pending, the notice

(1) Shall be published once a week for four successive weeks in some newspaper published in the same judicial district, or

(2) Shall be posted at the courthouse door in the county for thirty days. (1947, c. 693, s. 1; 1967, c. 954, s. 3.)

Editor's Note.—

The 1967 amendment rewrote subsection (a), substituted "publication is begun" for "the order of publication is made" in the first sentence of subsection (b), and deleted subsection (d).

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Late Filing of Newspaper's Affidavit.—After the court acquires control of a debt by the garnishment order, objections that the affidavit of the newspaper showing the publication of the notice and the sheriff's endorsement and return showing the levy in the garnishment proceeding were not timely filed as the law required, are not sufficient to justify a motion to dismiss. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

Part 3. Execution of Order of Attachment; Garnishment.

§ 1-440.16. Sheriff's return.

Late Filing of Return.—After the court acquires control of a debt by the garnishment order, objections that the affidavit of the newspaper showing the publication of the notice and the sheriff's endorsement and return showing the levy in the garnishment proceeding were not timely filed as the law required, are not sufficient to justify a motion to dismiss. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

§ 1-440.20. Levy on goods in warehouses.

Applied in Davenport v. Ralph N. Peters & Co., 274 F. Supp 99 (W.D.N.C. 1966), rev'd, 386 F.2d 199 (4th Cir. 1967).

§ 1-440.21. Nature of garnishment.

Proper Remedy to Reach Intangibles.—Garnishment is a proper ancillary remedy by which to discover intangible property rights and subject them to attachment. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

Prerequisites for Jurisdiction over Debt.—In order to subject a debt to garnishment and to give the court jurisdiction to act with respect thereto, three things should occur: (a) The corporation who is the garnishee must have such a residence and agency within the State as renders it amenable to the process of the court; (b) the principal defendant, who is the plaintiff's debtor, must himself have the right to sue the garnishee, his debtor, in this State for the recovery of the debt; (c) it must appear that the situs of the debt is in this State. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

Findings that the garnishee was a domesticated corporation, that it owed a debt, evidenced by a note, to a foreign corporation, that the note was assignable to the stockholders of the foreign corporation, that the foreign corporation owed a debt to plaintiff, that plaintiff, in his suit against the foreign corporation, duly garnished the debt and by amendment had the individual stockholders of the foreign corporation made parties, warrant the court in denying defendants' motion to dismiss for want of jurisdiction. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

Cross Action against Garnishee Not Permitted. — Defendant in an action on contract is not entitled to file a cross action on a separate contract against a party brought in by plaintiff solely for the purpose of garnishment. Kitchen Equip. Co. v. International Erectors, Inc., 268 N.C. 127, 150 S.E.2d 29 (1966).

Part 5. Miscellaneous Procedure Pending Final Judgment.

§ 1-440.36. Dissolution of the order of attachment.

Dissolution of Bond.—Defendants were not prevented from challenging the court's ex parte findings on which the attachment and temporary restraining order were based because of the substitution of their bond. And, having shown that the attachment was erroneously ordered, they were entitled to have their bond dissolved. Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

Applied in Armstrong v Aetna Ins. Co., 249 N.C. 352, 106 S.E.2d 515 (1959).

Cited in Hill v. Dawson, 248 N.C. 95, 102 S.E.2d 396 (1958); Godwin v. Vinson, 254 N.C. 582, 119 S.E.2d 616 (1961).

§ 1-440.39. Discharge of attachment upon giving bond.

Effect of Undertaking as Waiver or Estoppel.—

The filing of bond by a defendant to release his property from an attachment does not bar defendant from challenging the validity of the attachment Armstrong v. Aetna Ins. Co., 249 N.C. 352, 106 S.E.2d 515 (1959).

Defendants were not prevented from challenging the court's ex parte findings on which the attachment and temporary restraining order were based because of the substitution of their bond. And, having shown that the attachment was erroneously ordered, they were entitled to have their bond dissolved. Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.-N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

Cited in Godwin v. Vinson, 254 N.C. 582, 119 S.E.2d 616 (1961).

Part 6. Procedure after Judgment.

§ 1-440-45. When defendant prevails in principal action.

When Defendant May Proceed on Bond. —If an order of attachment is dissolved, dismissed, or set aside by the court, or if the attachment plaintiff fails to obtain judgment against the attachment defendant, the attachment defendant may without the necessity of showing malice or want of probable cause, proceed against the attachment plaintiff and his surety jointly or severally by independent action or motion in the cause, on the contractual obligations of the attachment plaintiff and his surety embodied in the bond and the statute under which it is given Brown v. Guaranty Estates Corp., 239 N.C. 595, 80 S.E.2d 645 (1954); Godwin v. Vinson, 254 N.C. 582, 119 S.E.2d 616 (1961).

§ 1-440.46. When plaintiff prevails in principal action.

Cited in Hill v. Dawson, 248 N.C. 95, 102 S.E.2d 396 (1958).

Article 36

Claim and Delivery.

§ 1-472. Claim for delivery of personal property.

Editor's Note. — For note as to availability of equitable replevin in North Carolina, see 33 N.C.L. Rev. 74-77 (1954).

Plaintiff May Recover Both Possession of Property and Damages for Its Detention.—In a proceeding for claim and delivery of personal property a plaintiff is entitled in a single action to recover both possession of the property and damages for its detention. Bowen v. King, 146 N.C. 385, 59 S.E. 1044 (1907); Mica Indus., Inc. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

Action Will Lie against Officer Taking Property under Execution against Third Person. — An action for claim and delivery of personal property can be maintained by the owner against an officer taking the same under an execution against a third person. Jones v. Ward, 77 N.C. 337 (1877); Churchill v. Lee, 77 N.C. 341 (1877); Mitchell v. Sims, 124 N.C. 411, 32 S.E. 735 (1899); Mica Indus., Inc. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

§ 1-473. Affidavit and requisites.

Action Will Lie Where Property Seized under Execution against Third Person.— See note to § 1-472.

Cited in Keith Tractor & Implement Co. v. McLamb, 252 N.C. 760, 114 S.E.2d 668 (1960); General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 117 S.E.2d 479 (1960).

§ 1-475. Plaintiff's undertaking.

Cited in Universal C.I.T. Credit Corp. v. Saunders, 235 N.C. 369, 70 S.E.2d 176 (1952); Moore v. Humphrey, 247 N.C. 423, 101 S.E.2d 460 (1958); Tillis v. Calvine Cotton Mills, Inc., 251 N.C. 359, 111 S.E.2d 606 (1959).

§ **1-478. Defendant's undertaking for replevy.**—At any time before the delivery of the property to the plaintiff, the defendant may, if he does not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, payable to the plaintiff, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, with damages, not less than the difference in value of the property at the time of the execution of the undertaking and the value of the property at the time of its delivery to the plaintiff, together with damages for detention and the costs, if delivery can be had, and if delivery cannot be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon, as damages for such taking and detention together with the costs of the action. If a return of the property is not so required, within three days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, unless it is claimed by an interpleader.

The defendant's undertaking shall include liability for costs, as provided in this section, only where the undertaking is given in actions instituted in the superior court. (C. C. P., s. 181; Code, s. 326; 1885, c. 50, s. 2; Rev., s. 795; 1911, c. 17; C. S., s. 836; 1961, c. 462.)

Editor's Note. — The 1961 amendment deleted the words "for its deterioration and detention" formerly appearing after the words "damages" in line seven and substituted in lieu thereof the words "not less than the difference in value of the property at the time of the execution of the undertaking and the value of the property at the time of its delivery to the plaintiff together with damages for detention."

Cited in Universal C.I.T. Credit Corp. v. Saunders, 235 N.C. 369, 70 S.E.2d 176 (1952); General Tire & Rubber Co. v. Distributors, Inc., 251 N.C. 406, 111 S.E.2d 614 (1959).

§ **1-482. Property claimed by third person; proceedings.**

Cross reference.—
For requisites of affidavit, see § 1-473

ARTICLE 37

Injunction

§ **1-485. When preliminary injunction issued.**—A preliminary injunction may be issued by order in accordance with the provisions of this article. The order may be made by any judge of the superior court in the following cases, and shall be issued by the clerk of the court in which the action is required to be tried:

(1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,

(2) When, during the litigation, it appears by affidavit that a party thereto is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual; or,

(3) When, during the pendency of an action, it appears by affidavit of any person that the defendant threatens or is about to remove or dispose of his property, with intent to defraud the plaintiff. (C. C. P., ss. 188, 189; Code, ss. 334, 338; Rev., s. 806; C. S., s. 843; 1967, c. 954, s. 3.)

I. GENERAL CONSIDERATION.

Editor's Note. — The 1967 amendment substituted "preliminary" for "temporary" in the first sentence.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

The burden is upon the applicant for an interlocutory injunction to prove a probability of substantial injury to the applicant from the continuance of the activity of which it complains to the final determination of the action. Board of Provincial Elders v. Jones, 273 N.C. 174, 159 S.E.2d 545 (1968).

Discretion of Court.—It ordinarily lies in the sound discretion of the court to determine whether or not a temporary injunction will be granted on hearing pleadings and affidavits only In the exercise of such discretion the court should consider the inconvenience and damage to defendant as well as the benefit that will accrue to the plaintiff. Western Conference of Original Free Will Baptists v. Creech, 256 N.C. 128, 123 S.E.2d 619 (1962).

The constitutionality of a statute or ordinance should not be decided in an interlocutory injunction on pleadings and an ex parte affidavit, but should be determined at the hearing on the merits, when all the facts can be shown. Schloss v. Jamison, 258 N.C. 271, 128 S.E.2d 590 (1962).

Findings and Proceedings Are Not Binding at Trial on Merits.—The findings of fact and other proceedings of the judge who hears the application for an interlocutory injunction are not binding on the parties at the trial on the merits Indeed, these findings and proceedings are not proper matters for the consideration of the court or jury in passing on the issues determinable at the final hearing. Schloss v. Jamison, 258 N.C. 271, 128 S.E.2d 590 (1962).

Appeal.—On appeal the Supreme Court is not bound by the findings or ruling of the court below in injunction cases, but may review the evidence on appeal. Even so, there is a presumption that the judgment entered below is correct, and the burden is upon appellant to assign and show error Western Conference of Original Free Will Baptists v. Creech, 256 N.C. 128, 123 S.E.2d 619 (1962).

Cited in Brown v. Williams, 242 N.C. 648, 89 S.E.2d 260 (1955).

II. NATURE.

The remedy authorized by this section is an ancillary one afforded by the courts of equity for the purpose of preserving the status quo pending the action. It will issue to prevent an injury being committed or seriously threatened. In addition, a mandatory injunction may be issued to restore the status wrongfully disturbed. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 237 N.C. 88, 74 S.E.2d 430 (1953).

Purpose Is to Maintain Status Quo.—It is the purpose of a temporary injunction to maintain as nearly as possible the status quo Western Conference of Original Free Will Baptists v. Creech, 256 N.C. 128, 123 S.E.2d 619 (1962).

III. GROUNDS OF RELIEF

A. Character of Relief in General.

The grant of a preliminary mandatory injunction is within the prerogative jurisdiction of courts of equity. Such preliminary injunctions are issued to preserve the status quo until upon final hearing the court may grant full relief, and are usually issued in cases where the defendant has proceeded knowingly in breach of contract or in willful disregard of an order of court. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 237 N.C. 88, 74 S.E.2d 430 (1953).

Mandatory Injunction May Be Issued for Protection of Easements and Proprietary Rights.—When it appears with reasonable certainty that the complainant is entitled to relief, the court will ordinarily issue the preliminary mandatory injunction for the protection of easements and proprietary rights. In such case it is not necessary to await the final hearing If the asserted right is clear and its violation palpable, and the complainant has not slept on his rights, the writ will generally be issued without exclusive regard to the final determination of the merits and the defendant compelled to undo what he has done. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 237 N.C. 88, 74 S.E.2d 430 (1953).

Mandatory Injunction Should Not Be Issued Except in Case of Apparent Necessity. — A preliminary mandatory injunction on ex parte application should not be granted, except in case of apparent necessity for the purpose of restoring the status quo pending the litigation Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 237 N.C. 88, 74 S.E.2d 430 (1953).

Injury Must Be Immediate, Pressing, Irreparable, and Clearly Established.—As a rule a mandatory order will not be made as a preliminary injunction, except where the injury is immediate, pressing, irreparable, and clearly established. Seaboard

Air Line R.R. v. Atlantic Coast Line R.R., 237 N.C. 88, 74 S.E.2d 430 (1953).

Injunctive relief is granted only when irreparable injury is real and immediate. This is especially true with reference to the issuance of a preliminary injunction. Board of Provincial Elders v. Jones, 273 N.C. 174, 159 S.E2d 545 (1968).

Mandatory Injunction Held Improvidently Granted.—See Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 237 N.C. 88, 74 S.E.2d 430 (1953).

C. Application of Section.

An injunction pendente lite should not be granted where there is a serious question as to the right of the defendant to engage in the activity and to forbid the defendant to do so, pending the final determination of the matter, would cause the defendant greater damage than the plaintiff would sustain from the continuance of the activity while the litigation is pending. Board of Provincial Elders v. Jones, 273 N.C. 174, 159 S.E.2d 545 (1968).

Injunction Subsidiary to Another Action or Special Proceeding.—A court of equity, or a court in the exercise of its equity powers, may use the writ of injunction as a remedy subsidiary to and in aid of another action or special proceeding. However, in such cases, in order to justify continuing the writ until the final hearing, ordinarily it must be made to appear (1) that there is probable cause the plaintiff will be able to establish the asserted right, and (2) that there is a reasonable apprehension of irreparable loss unless the temporary order of injunction remains in force, or that in the opinion of the court such injunctive relief appears to be reasonably necessary to protect the plaintiff's rights until the controversy can be determined Edmonds v. Hall, 236 N.C. 153, 72 S.E.2d 221 (1952).

By subsidiary injunction proceedings a party to an action may be restrained from committing an act respecting the subject of the action which would render judgment therein ineffective Edmonds v. Hall, 236 N.C. 153, 72 S.E.2d 221 (1952).

When Temporary Injunction Granted.—Ordinarily a temporary injunction will be granted pending trial on the merits, (1) if there is probable cause for supposing that plaintiff will be able to sustain his primary equity and (2) if there is reasonable apprehension of irreparable loss unless injunctive relief be granted, or if in the court's opinion it appears reasonably necessary to protect plaintiff's right until the controversy between him and defendant can be determined. Western Conference of Original Free Will Baptists v. Creech, 256 N.C. 128, 123 S.E.2d 619 (1962).

§ 1-486. When solvent defendant restrained.

Editor's Note.—For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

Weighing Relative Conveniences and Inconveniences to Parties.—The hearing judge may issue an interlocutory injunction upon the application of the plaintiff in actual or constructive possession to enjoin a trespass on land when the trespass would be continuous in nature and produce injury to the plaintiff during the litigation. But the rule that the judge will consider and weigh the relative conveniences and inconveniences to the parties in determining the propriety of the injunction is operative here. In consequence, an interlocutory injunction against a trespass should be refused where its issuance would confer little benefit on the plaintiff and cause great inconvenience to the defendant. Huskins v. Yancey Hosp., Inc., 238 N.C. 357, 78 S.E.2d 116 (1953).

Applied in Norman v. Williams, 241 N.C. 732, 86 S.E.2d 593 (1955).

§ 1-487. Timber lands, trial of title to.

Editor's Note.—For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

§ 1-488. When timber may be cut.

Editor's Note.—For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

§ 1-489: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-490: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to duration of temporary restraining order, see Rule 65 of the Rules of Civil Procedure (§ 1A-1).

§ 1-491: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to notice before issuance of preliminary injunction, see Rule 65 of the Rules of Civil Procedure (§ 1A-1).

§ 1-492: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-493. What judges have jurisdiction.

Cited in Baker v. Varser, 239 N.C. 180, 79 S.E.2d 757 (1954).

§ 1-494. Before what judge returnable.—All restraining orders and injunctions granted by any of the judges of the superior court shall be made returnable before the resident judge of the district, a special judge residing in the district, or any superior court judge assigned to hold court in the district where the civil action or special proceeding is pending, within twenty (20) days from date of order. If a judge before whom the matter is returned fails, for any reason, to hear the motion and application, on the date set or within ten (10) days thereafter any regular or special judge resident in, or assigned to hold the courts of, some adjoining district may hear and determine the said motion and application, after giving ten days' notice to the parties interested in the application or motion. This removal continues in force the motion and application theretofore granted till they can be heard and determined by the judge having jurisdiction. (1876, c. 223, s. 2; 1879, c. 63, ss. 2, 3; 1881, c. 51; Code, s. 336; Rev., s. 815; C. S., s 852; 1963, c. 1143.)

Editor's Note.—The 1963 amendment rewrote this section so as to permit restraining orders and injunctions to be made returnable before special judges of the superior court.

§ 1-496: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 65 of the Rules of Civil Procedure (§ 1A-1).

§ 1-497: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 65 of the Rules of Civil Procedure (§ 1A-1).

§ 1-498. Application to extend, modify, or vacate; before whom heard.—Applications to extend, modify, or vacate temporary restraining orders and preliminary injunctions may be heard by the judge having jurisdiction if he is within the district or in an adjoining district, but if out of the district and not in an adjoining district, then before any judge who is at the time in the district, and if there is no judge in the district, before any judge in an adjoining district. (C. C. P., s. 195; Code, s. 344; 1905, c. 26; Rev., s. 819; C. S., s. 856; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment rewrote this section.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Applied in City of New Bern v. Walker, 255 N.C. 355, 121 S.E.2d 544 (1961).

§ 1-499: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-500. Restraining orders and injunctions in effect pending appeal; indemnifying bond. — Whenever a plaintiff shall appeal from a judgment rendered at chambers, or in term, either vacating a restraining order theretofore granted, or denying a perpetual injunction in any case where such injunction is the principal relief sought by the plaintiff, and where it shall appear that vacating said restraining order or denying said injunction will enable the defendant to consummate the threatened act, sought to be enjoined, before such appeal can be heard, so that the plaintiff will thereby be deprived of the benefits of any judgment of the appellate division, reversing the judgment of the lower court, then in such case the original restraining order granted in the case shall in the discretion of the trial judge be and remain in full force and effect until said appeal shall be finally disposed of: Provided, the plaintiff shall forthwith execute and deposit with the clerk a written undertaking with sufficient surety, approved by the clerk or judge, in an amount to be fixed by the judge to indemnify the party enjoined against all loss, not exceeding an amount to be specified, which he may suffer on account of continuing such restraining order as aforesaid, in the event that the judgment of the lower court is affirmed by the appellate division. (1921, c. 58; C. S., s. 858(a); 1969, c. 44, s. 12.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" near the middle and at the end of the section.

Discretion of Court, etc.—

The dissolution of a restraining order is in the discretion of the trial judge. Such an order is not reviewable by the appellate division except in cases of abuse of discretion. Currin v. Smith, 270 N.C. 108, 153 S.E.2d 821 (1967).

Applied in Treasure City of Fayetteville, Inc. v. Clark, 261 N.C. 130, 134 S.E.2d 97 (1964); Clark's Charlotte Inc. v. Hunter, 261 N.C. 222, 134 S.E.2d 364 (1964); Frosty Ice Cream, Inc. v. Hord. 263 N.C. 43, 138 S.E.2d 816 (1964); High Point Surplus Co. v. Pleasants, 263 N.C. 587, 139 S.E.2d 892 (1965); High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965).

Cited in GI Surplus Store, Inc. v. Hunter, 257 N.C. 206, 125 S.E.2d 764 (1962).

ARTICLE 38

Receivers.

Part 1 Receivers Generally

§ 1-501. What judge appoints.

Cited in East Carolina Lumber Co v West, 247 N.C. 699, 102 S.E.2d 248 (1958); Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

§ 1-502. In what cases appointed

4. In cases provided in G. S. 1-507.1 and in like cases, of the property within this State of foreign corporations.

The provisions of G. S. 1-507.1 through 1-507.11 are applicable, as near as may be, to receivers appointed hereunder. (C. C. P., s. 215, 1876-7, c. 223; 1879, c. 63, 1881, c. 51; Code, s. 379, Rev., s 847; C S., s. 860; 1955, c. 1371, s 3.)

Editor's Note.—The 1955 amendment effective July 1, 1957, rewrote paragraph 4 and the last unnumbered paragraph Only the two rewritten paragraphs are set out

Receivership is ordinarily ancillary to some equitable relief. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

Discretion, etc.—

A receiver may be appointed pendente lite in the discretion of the court. Murphy

v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

A receiver will not, etc.—

Receivership is a harsh remedy and will be granted only where there is no other safe or expedient remedy. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

Domestic Relations.—Receivers have been appointed in domestic relations cases to preserve specific property and to collect rents and income. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

Applied in National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Cited in York v. Cole, 251 N.C. 344, 111 S.E.2d 334 (1959).

§ 1-503. Appointment refused on bond being given.

Cited in York v. Cole, 251 N. C. 344, 111 S. E. (2d) 334 (1959).

§ 1-505. Sale of property in hands of receiver.—The resident judge or the judge assigned to hold any of the courts in any judicial district of North Carolina shall have power and authority to order a sale of any property, real or personal, in the hands of a receiver duly and regularly appointed by the superior court of North Carolina upon such terms as appear to be to the best interests of the creditors affected by said receivership. The procedure for such sales shall be as provided in article 29A of chapter 1 of the General Statutes. (1931, c. 123, s. 1; 1949, c. 719, s. 2; 1955, c. 399, s. 1.)

Editor's Note.—

The 1955 amendment eliminated from the beginning of the second sentence "Except as provided in G. S. § 1-506."

Sale of Property in Hands of Receiver Appointed to Enforce Payment of Alimony. — In a wife's action for alimony without divorce, a receiver appointed therein to take possession of the husband's property within the State may collect the income from the husband's realty for the purpose of paying alimony awarded the wife in the action and may sell the husband's real estate if necessary to pay the alimony decreed. Lambeth v. Lambeth, 249 N.C. 315, 106 S.E.2d 491 (1959).

A judge of the superior court has the power to order the sale of a defendant husband's non-income-producing real estate for the purpose of investing the proceeds in legal investments as provided in article 6 of chapter 53, so as to produce an income sufficient to enable a receiver appointed to enforce payment of alimony decreed to pay the expenses of the receivership and alimony awarded the plaintiff wife. Lambeth v. Lambeth, 249 N.C. 315, 106 S.E.2d 491 (1959).

§ 1-506: Repealed by Session Laws 1955, c. 399, s. 2.

Part 2. Receivers of Corporations.

§ 1-507.1. Appointment and removal.—When a corporation becomes insolvent or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, or has forfeited its corporate right, or its corporate existence has expired by limitation, a receiver may be appointed by the court under the same regulations that are provided by law for the appointment of receivers in other cases; and the court may remove a receiver or trustee and appoint another in his place, or fill any vacancy. Everything required to be done by receivers or trustees is valid if performed by a majority of them. (Code, s. 668; 1901, c. 2, ss. 73, 79; Rev., ss. 1219, 1223; C. S., s. 1208; 1955, c. 1371, s. 2.)

Editor's Note. — Session Laws 1955, c. 1371, s. 2, effective July 1, 1957, transferred former G. S. 55-147 through 55-157 to appear as this and the ten following sections.

For article on corporate receivership in North Carolina, see 32 N.C.L. Rev. 149 (1954).

Broad Powers Conferred.—This part is so broad and comprehensive in its provisions regarding the appointment of receivers that it is not necessary to refer to the general power of a court of equity in such cases. Summit Silk Co. v. Kinston Spinning Co., 154 N.C. 421, 70 S.E. 820 (1911).

The law contemplates the settlement of all claims against the insolvent debtor in the original action in which the receiver is appointed, except in the infrequent instances where the appointing court, for good cause shown, grants leave to a claimant to bring an independent action against the receiver. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

Section Does Not Limit Power of Court.—The power of the court to appoint a receiver in proper cases is not limited by this section or § 1-502. Sinclair v. Moore Cent. R. R., 228 N.C. 389, 45 S.E.2d 555 (1947).

Nature of Receivership.—Upon the insolvency of a corporation and the appointment of a receiver under the provisions of this section, the receiver represents the creditors as well as the owners, excluding the general creditors from taking any separate or effective steps on their account in furtherance of their claims; and the proceeding for the receivership is in the nature of a judicial process by which the rights of the general creditors are fastened upon the property. Observer Co. v. Little, 175 N.C. 42 94 S.E. 526 (1917).

Discretion of Court.—The selection of a receiver for an insolvent corporation is a matter largely in the discretion of the trial judge, and will not generally be reviewed unless this discretionary power has been greatly abused; and though the practice of appointing the plaintiff's attorney as receiver is not commended. he will not be removed. as a matter of law on appeal. though, like any other receiver. he may be removed upon application to the proper judge of the superior court. Mitchell v. Aulander Realty Co., 169 N.C. 516, 86 S.E. 358 (1915). See Fisher v. Southern Loan & Trust Co., 138 N.C. 90, 50 S.E. 592 (1905).

Effect of Appointment.—The appointment of a receiver, who is directed to take control of all the property of a company, and to assume entire management of its affairs, has the effect of suspending all the officers of the company; and they cannot interfere with the business of the company, and are entitled to no salaries during the continuance of the receivership. Lenoir v. Linville Improvement Co., 126 N.C. 922, 36 S.E. 185 (1900).

Title of Receiver Relates Back.—The title of the receiver on his appointment dates back to the time of granting the order, even though certain preliminary conditions must first be performed and the receiver remains out of possession pending such performance. Worth v. Bank of New Hanover, 122 N.C. 397, 29 S.E. 775 (1898); Pelletier v. Greenville Lumber Co., 123 N.C. 596, 31 S.E. 855 (1898); Battery Park Bank v. Western Carolina Bank, 127 N.C. 432, 37 S.E. 461 (1900); Fisher v. Western Carolina Bank, 132 N.C. 769. 44 S.E. 601 (1903).

Continuance of Receivership.—A receivership continues as long as the court may think it necessary to the performance of the duties pertaining thereto. Young v. Rollings, 90 N.C. 125 (1884).

Officers' Duty When Receiver Appointed.—An order appointing a receiver of a defunct corporation with power to receive into possession all the effects of the company, and with the usual rights and powers of receivers, involves the correlative duty of delivering the funds to him by the late officers of the company in whose hands the funds are, although this is not expressly required in the decretal order. Young v. Rollings, 90 N.C. 125 (1884).

Valid Liens Not Divested.—The title of a receiver relates only to the time of his appointment, and valid liens existing at that time are not divested. Battery Park Bank v. Western Carolina Bank, 127 N.C. 432, 37 S.E. 461 (1900); Roberts v. Bowen Mfg. Co., 169 N.C. 27. 85 S.E. 45 (1915).

Where Assignee Appointed Receiver.—One to whom an insolvent bank made an assignment of its assets, and who on the same day, and at the suit of creditors, was appointed receiver, held the assets after such adjudication, not by virtue of the deed of assignment, but as an officer of the court appointed to settle and wind up the affairs of such insolvent bank. Davis v. Industrial Mfg. Co., 114 N.C. 321, 19 S.E. 371 (1894).

Receiver Appointed after Reorganization.—The organization of a new corporation at once dissolves the old one, and if there are creditors of the dissolved corporation they may cause the property of the defunct corporation to be applied to their debts by means of a receiver. Marshall v. Western, N.C. R.R., 92 N.C. 322 (1885).

Dissolution of De Facto Corporation.—Assuming that a bank which had never been duly incorporated had a corporate existence as to those who bona fide dealt with it is as corporation, a receiver should be appointed to take charge of and preserve its effects, where it has voluntarily dissolved, and no one claims to own its stock, and all its supposed officers disclaim their offices. Dobson v. Simonton, 78 N.C. 63 (1878).

Fraudulent Disposal of Property.—If, during the existence of a corporation, its officers fraudulently or unlawfully disposed of any of its property, the creditors are entitled to have a receiver appointed to sue for and recover it. Latta v. Catawba Elec. Co., 146 N.C. 285, 59 S.E. 1028 (1907).

Cessation of Business.—Where a corporation had ceased operation, a stockholder had the right to maintain an action for the appointment of a receiver, although the corporation had not been dissolved in accordance with the provisions of the statute. Greenleaf v. Land & Lumber Co., 146 N.C. 505, 60 S.E. 424 (1908).

When Receiver Unnecessary.—It is unnecessary to have a receiver appointed in order for the assignee of a judgment creditor, and those beneficially interested, to maintain an action against officers and stockholders for misapplication of funds in distribution among the shareholders as dividends. Chatham v. Mecklenburg Realty Co., 180 N.C. 500, 105 S.E. 329 (1920).

Remedy Not Available in Federal Courts.—This section does not confer upon a stockholder or a creditor a substantive right, but merely gives a new remedy, and such remedy is not available in the federal courts. Abm. S. See & Depew, Inc. v. Fisheries Prods. Co., 9 F.2d 235 (2nd Cir. 1925).

Adjudication of Bankruptcy during Insolvency Proceedings.—Proceedings against an insolvent corporation under this section do not preclude creditors from petitioning to have the corporation adjudged a bankrupt, notwithstanding the action of the State courts. In re McKinnon Co., 237 F. 869 (E.D.N.C. 1916).

Statutes Applicable to Receiver Appointed under Code of Civil Procedure.—Under G. S. 1-502, the statutes embodied in this Part are "applicable, as near as may be," to a receiver appointed under the Code of Civil Procedure. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Order Made without Specific Findings of Fact or Request Therefor.—Where an order appointing receivers is made without specific findings of fact and without any request for findings, it will be presumed that the judge accepted as true for the purposes of the order the facts alleged in the complaint, used as an application for receivership. Royall v. Carr Lumber Co., 248 N.C. 735, 105 S.E.2d 65 (1958).

Cited in Savannah Sugar Ref. Co. v. Royal Crown Bottling Co., 259 N.C. 103, 130 S.E.2d 33 (1963).

§ 1-507.2. Powers and bond.—The receiver has power and authority to—

1. Demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description of the corporation.

2. Foreclose mortgages, deeds of trust, and other liens executed to the corporation.

3. Institute suits for the recovery of any estate, property, damages, or demands existing in favor of the corporation, and he shall, upon application by him, be substituted as party plaintiff in the place of the corporation in any suit or proceeding pending at the time of his appointment.

4. Sell, convey, and assign all of the said estate, rights, and interest.

5. Appoint agents under him.

6. Examine persons and papers, and pass on claims as elsewhere provided in this part.

7. Do all other acts which might be done by the corporation, if in being, that are necessary for the final settlement of its unfinished business.

The powers of the receiver may be continued as long as the court thinks necessary, and the receiver shall hold and dispose of the proceeds of all sales of property under the direction of the court, and, before acting, must enter into such bond and comply with such terms as the court prescribes. (Code, s. 668; 1901, c. 2, ss. 74, 84; Rev., ss. 1222, 1231; C. S., s. 1209; 1955, c. 1371, s. 2.)

Source of Receiver's Authority.—A receiver receives his authority from the applicable statutes, together with the directions and instructions of the court in its order appointing him. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

Capacity in Which Property Held and Disposed of.—The receiver holds and disposes of all property coming into his hands in his official capacity under the direction of the court. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

Appointment of Receiver Does Not Suspend Running of Limitations. — When a statute of limitations has begun to run, no subsequent disability will stop it, and ordinarily the mere appointment of a receiver will not toll the statute unless the circumstances are such that such appointment precludes the institution of suit. Thus, when a receiver has full authority to institute suit, as in the instant case, his appointment will not suspend the running of limitations under § 1-40. Nicholas v Salisbury Hdwe. & Furniture Co., 248 N.C. 462, 103 S.E.2d 837 (1958).

Directors Superseded.—Appointment of receivers of a corporation on a creditors' bill supersedes the power of the directors to carry on the business of the corporation, and the receivers take possession of the corporation until further order of the court. Abm. S. See & Depew, Inc. v. Fisheries Prods. Co., 9 F.2d 235 (2nd Cir. 1925).

Power of Receiver to Bring All Actions.—The receiver represents and, in a certain sense, succeeds to the rights of the corporation. There is no valid reason why he may not, representing the corporation and its creditors, bring any and all actions in respect to its assets, or rights of action, which it or its creditors could have brought. Smathers v. Western Carolina Bank, 135 N.C. 410, 47 S.E. 893 (1904).

All Rights May Be Adjusted.—In a suit by the receivers of a bank may be adjudicated all the rights of the bank, its creditors, and the defendant debtor, both legal and equitable, pertaining to the matters set out in the pleadings, and such judgment may be entered as will enforce the rights of the general creditors and also protect any equities that the defendant may be entitled to. Smathers v. Western Carolina Bank, 135 N.C. 410, 47 S.E. 893 (1904). See Gray v. Lewis, 94 N.C. 392 (1886); Davis v. Industrial Mfg. Co., 114 N.C. 321, 19 S.E. 371, 23 L.R.A. 322 (1894).

The receiver may sue either in his own name or that of the corporation. In whichever name he may elect to bring the action, it is essentially a suit by the corporation, prosecuted by order of the court, for the collection of the assets. Gray v. Lewis, 94 N.C. 392 (1886); Davis v. Industrial Mfg. Co., 114 N.C. 321, 19 S.E. 371, 23 L.R.A. 322 (1894); Smathers v. Western Carolina Bank, 135 N.C. 410, 47 S.E. 893 (1904).

Receiver May Plead Usury.—The plea of usury may be made by the receiver of an insolvent corporation against which a usurious contract is sought to be enforced. Riley v. Sears, 154 N.C. 509, 70 S.E. 997 (1911).

Valid Existing Liens Protected.—The title of a receiver of a private corporation to the corporate property relates back only to the time of his appointment, and it cannot divest the property of valid liens existing at that time. Roberts v. Bowen Mfg. Co., 169 N.C. 27, 85 S.E. 45 (1915).

Receiver Has No Extraterritorial Power.—A receiver, appointed in a stockholder's action to sequester assets of the corporation against mismanagement of its officers and directors, has no extraterritorial power. Abm. S. See & Depew, Inc. v. Fisheries Prods. Co., 9 F.2d 235 (2nd Cir. 1925).

Priority between Receivers.—One receiver has no priority over another receiver previously appointed in another district on a creditor's bill. Abm. S. See & Depew, Inc. v. Fisheries Prods. Co., 9 F.2d 235 (2nd Cir. 1925).

Power after Charter Has Expired.—A receiver, appointed under § 1-507.1 to wind up the affairs of a corporation, can proceed to collect the assets and to prosecute and defend suits, after the corporation has ceased to exist by the expiration of its charter. Asheville Div. Number 15 v. Aston, 92 N.C. 578 (1885).

Effect of Judgment against Corporation.—Judgments against a corporation rendered upon process issued after it ceased to exist are of no validity; and the same may be impeached by a party interested in the administration of its assets. Dobson v. Simonton, 86 N.C. 492 (1882).

Conveyances.—While subdivision 4 empowers receivers to convey the estate, the receiver of a corporation may not ordinarily dispose of a substantial part of the assets entrusted to him without authority of court, and sales are subject to confirmation unless authority to convey on specified terms is expressly given. Harrison v. Brown, 222 N.C. 610, 24 S.E.2d 470 (1943).

Deed Held Sufficient to Pass Title.—Where, under a court order, the receiver of an insolvent bank had conveyed lands according to the terms of a deed of trust by which the bank held the land, applying this and § 1-507.3 the deed was sufficient in law to pass title. Wachovia Bank & Trust Co. v. Hudson, 200 N.C. 688, 158 S.E. 244 (1931).

§ 1-507.3. Title and inventory.—All of the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects, upon the appointment of a receiver, forthwith vest in him, and the corporation is divested of the title thereto. Within thirty days after his appointment he shall lay before the court a full and complete inventory of all estate, property, and effects of the corporation, its nature and probable value, and an account of all debts due from and to it, as nearly as the same can be ascertained, and shall make a report of his proceedings to the superior court at such times as the court may direct during the continuance of the trust. (1901, c. 2, ss 75, 80; Rev., ss. 1224, 1225; C. S., s. 1210; 1945, c. 635; 1955, c. 1371, s. 2.)

Receiver holds title to property vested in him as an officer of the court. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

Prior Liens Not Divested.—In the very nature of things, the receiver takes the property of the insolvent debtor subject to the mortgages, judgments, and other liens existing at the time of his appointment. This rule is recognized and enforced when the court permits a receiver to sell encumbered property free from liens, and transfers the liens to the proceeds of sale under G. S. 1-507.8. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

The appointment of a receiver does not divest the property of prior existing liens, but the court, through its receiver, receives such property impressed with all existing rights and equities, and the relative ranks of claims and standing of liens remain unaffected by the receivership. Pelletier v. Greenville Lumber Co., 123 N.C. 596, 31 S.E. 855 (1898); Battery Park Bank v. Western Carolina Bank, 127 N.C. 432, 37 S.E. 461 (1900); Fisher v. Western Carolina Bank, 132 N.C. 769, 44 S.E. 601 (1903); Garrison v. Vermont Mills, 154 N.C. 1, 69 S.E. 743 (1910); Witherell v. Murphy, 154 N.C. 82, 69 S.E. 748 (1910).

Insurance Policies Not Forfeited.—The vesting of the property of a corporation in the receiver under this section does not constitute such a change in the "interest, title or possession" of the property as to forfeit insurance policies on the property. Southern Pants Co. v. Rochester German Ins. Co., 159 N.C. 78, 74 S.E. 812 (1912).

Effect of Subsequent Judgments.—The title to the property of a corporation vests in the receiver at the time he was duly appointed by the court, from which time the corporation is divested thereof, and a judgment against the corporation entered thereafter, but before the docketing of the order or the qualifying of the receiver thereunder, can acquire no lien in favor of the judgment creditor. Odell Hardware Co. v. Holt-Morgan Mills, 173 N.C. 308, 92 S.E. 8 (1917).

A judgment rendered in an independent action after the appointment of a receiver does not create a lien on the corporate property as against the receiver. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

A judgment rendered against a corporation does not relate back, by implication of law, to the beginning of the term, so as to create a lien on the corporate property as against the vesting of the title in a receiver who had in the meanwhile been appointed. Odell Hardware Co. v. Holt-Morgan Mills, 173 N.C. 308, 92 S.E. 8 (1917).

Where a creditor held an unsecured claim against an insolvent partnership at the time of the appointment of the receiver, and subsequent to that event reduced such claim to judgment in an independent action against the partners, the creditor did not acquire any lien under the judgment on any of the property owned by the defendants as partners, because under this section such property vested in the receiver prior to the rendition of the judgment. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Effect of Unrecorded Conditional Sale Contract.—A receiver has the power of creditors armed with process to disregard or avoid the unrecorded condition in a contract of conditional sale. Observer Co. v. Little, 175 N.C. 42, 94 S.E. 526 (1917).

Where Receiver Refuses to Bring Action.—In an action brought by creditors, depositors or stockholders to recover assets belonging to the corporation, the title to which has vested in the receiver, upon his refusal to bring the action the receiver may properly be made a defendant, to the end that the recovery may be subject to orders and decrees by the court, in the judgment as to its application to the claims of creditors and depositors, or to its distribution among stockholders. Douglass v. Dawson, 190 N.C. 458, 130 S.E. 195 (1925).

§ 1-507.4. Foreclosure by receivers and trustees of corporate

mortgagees or grantees.—Where real estate has been conveyed by mortgage deed, or deed of trust to any corporation in this State authorized to accept such conveyance for the purpose of securing the notes or bonds of the grantor, and such corporation thereafter shall be placed in the hands of a receiver or trustee in properly instituted court proceedings, then such receiver or trustee under and pursuant to the orders and the decrees of the said court or other court of competent jurisdiction may sell such real property pursuant to the orders and the decrees of the said court or may foreclose and sell such real property as provided in such mortgage deed, or deed of trust, pursuant to the orders and decrees of such court.

All such sales shall be made as directed by the court in the cause in which said receiver is appointed or the said trustee elected, and for the satisfaction and settlement of such notes and bonds secured by such mortgage deed or deed of trust or in such other actions for the sales of the said real property as the said receiver or trustee may institute and all pursuant to the orders and decrees of the court having jurisdiction therein.

All sales of real property made prior to April 10, 1931 by such receiver or trustee of and pursuant to the orders of the courts of competent jurisdiction in such cases, are hereby validated. (1931, c. 265; 1955, c. 1371, s. 2.)

§ 1-507.5. May send for persons and papers; penalty for refusing to answer.—The receiver has power to send for persons and papers, to examine any persons, including the creditors, claimants, president, directors, and other officers and agents of the corporation, on oath or affirmation (which oath or affirmation the receiver may administer), respecting its affairs and transactions and its estate, money, goods, chattels, credits, notes, bills, choses in action, real and personal estate and effects of every kind; and also respecting its debts, obligations, contracts, and liabilities, and the claims against it; and if any person refuses to be sworn or affirmed, or to make answers to such questions as may be put to him, or refuses to declare the whole truth touching the subject matter of the examination, the court may, on report of the receiver, commit such person as for contempt. (1901, c. 2, s. 78; Rev., s. 1227; C. S., s. 1211; 1955, c. 1371, s. 2.)

§ 1-507.6. Proof of claims; time limit.—All claims against an insolvent corporation must be presented to the receiver in writing; and the claimant, if required, shall submit himself to such examination in relation to the claim as the receiver directs, and shall produce such books and papers relating to the claim as shall be required. The receiver has power to examine under oath or affirmation all witnesses produced before him touching the claim, and shall pass upon and allow or disallow the claims or any part thereof, and notify the claimants of his determination. The court may limit the time within which creditors may present and prove to the receiver their respective claims against the corporation, and may bar all creditors and claimants failing to do so within the time limited from participating in the distribution of the assets of the corporation. The court may also prescribe what notice, by publication or otherwise, must be given to creditors of such limitation of time. (1901, c. 2, ss. 81, 82; Rev., ss 1228, 1229; C. S., s. 1212; 1955, c. 1371, s 2.)

Duty of Court.—The court in control of a receivership should fix the time in which any and all claims against the estate of the insolvent debtor are to be presented to the receiver, give appropriate notice to creditors of such limitation of time by publication or otherwise, and postpone any order of distribution until an opportunity has been afforded for the determination of the status of all claims and their order of priority. National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950).

Court May Limit Time for Presentation and Proof of Claims.—This section authorizes the court to limit the time within which creditors may present and prove to the receiver their respective claims against a corporation and may bar all creditors and claimants failing to do so within the time allotted from participating in the distribution of the assets of the corporation. Tractor & Auto Supply Co. v. Fayetteville Tractor & Equip. Co., 2 N.C. App. 531, 163 S.E.2d 510 (1968).

Power of Receiver. — To enable the receiver to decide whether the claims are just, the law confers upon him plenary power to examine the claimants and witnesses touching the claims, and to require the production of relevant books and papers. National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950).

Creditors must file and prove their claims, when the court so directs, or be barred. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

Proof of claims must be filed with the receiver in writing pursuant to this section and within the time limit directed by the court or such claim may be barred. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

But Court May Extend Time for Filing. —The court has the discretion to permit the filing of claims subsequent to the time fixed after the appointment of the receiver. Odell Hardware Co. v. Holt-Morgan Mills, 173 N.C. 308, 92 S.E. 8 (1917).

Assignment Subject to Set-Off.—After the appointment of a receiver for a bank a creditor may assign his claim, but such assignment is subject to the receiver's right to set off claims the bank may have against the creditor, and if the assignee of a claim is himself a debtor of the bank he cannot use the assigned claim as a set-off. Davis v. Industrial Mfg. Co., 114 N.C. 321, 19 S.E. 371 (1894).

§ 1-507.7. Report on claims to court; exceptions and jury trial.—It is the duty of the receiver to report to the term of the superior court subsequent to a finding by him as to any claim against the corporation, and exceptions thereto may be filed by any person interested, within ten days after notice of the finding by the receiver, and not later than within the first three days of the said term; and, if, on an exception so filed, a jury trial is demanded, it is the duty of the court to prepare a proper issue and submit it to a jury; and if the demand is not made in the exceptions to the report the right to a jury trial is waived. The judge may, in his discretion, extend the time for filing such exceptions. Provided, that no court shall issue any order of distribution or order of discharge of a receiver until said receiver has proved to the satisfaction of the court that written notice has been mailed to the last known address of every claimant who has properly filed claim with the receiver, to the effect that such orders will be applied for at a certain time and place therein set forth and by producing a receipt issued by the United States post office, showing that such notice has been mailed to each of such claimant's last known address at least twenty days prior to the time set for hearing and passing upon such application to the court for said orders of distribution and/or discharge. (1901, c. 2, s. 83; Rev., s. 1230; C. S., s. 1213; 1945, c. 219; 1955, c. 1371, s. 2.)

The term "any person interested" undoubtedly includes a claimant who wishes to resist a finding by the receiver adjudging his claim to be invalid, or of less dignity than that alleged by him. Moreover, a creditor, who has a valid claim, is certainly a "person interested" for the purpose of opposing a report of the receiver allowing the validity or priority of other asserted claims, whose payment will exhaust or reduce the receivership assets otherwise available for the satisfaction of his claim. National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950).

Partner as "Interested Person."—A partner individually liable for partnership debts, if the partnership assets are insufficient to discharge a claim, is unquestionably an "interested person" who may challenge the validity of an asserted partnership obligation. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

The power to extend time for filing exceptions to receiver's report is expressly given by this section. Benson v. Roberson, 226 N.C. 103, 36 S.E.2d 729 (1946).

Exceptions Not Filed within Time Prescribed.—Exceptions filed and made a part of the record are not void as a matter of law because not filed within the first three days of the term of court commencing next after the filing of the receiver's report, in the absence of motion to strike or order to that effect, and a judgment entered on the ground that such exceptions were not before the court for consideration will be remanded. Benson v. Roberson, 226 N.C. 103, 36 S.E.2d 729 (1946).

Where objections were filed by a creditor of a corporation in the hands of a receiver to an order allowing a claim against such corporation, which order adjudicated material and controverted issues of fact without consent, evidence or findings, it was held error to deny a motion to set aside the allowance of such claim and refuse to grant a hearing on such objections alleging facts which if true would constitute a valid defense to such claim. Peoples Bank & Trust Co. v. Tar River Lumber Co., 224 N.C. 432, 31 S.E.2d 353 (1944). See also, Peoples Bank & Trust Co. v. Tar River Lumber Co., 224 N.C. 153, 29 S.E.2d 348 (1944).

Validity of claim must be determined by court. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

Adjudging Claim Preferred without Notice to Other Claimants.—An order of the superior court adjudging that the claim of a particular creditor constituted a preferred claim and ordering the receiver to pay such claim, made without notice, either actual or constructive, to other claimants, is contrary to the established rules of practice and procedure in receivership proceedings. National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950).

Establishment of Claim Where Jury Trial Waived. — National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Quoted in Tractor & Auto Supply Co. v. Fayetteville Tractor & Equip. Co., 2 N.C. App. 531, 163 S.E.2d 510 (1968).

Cited in Webb v. Gaskins, 255 N.C. 281, 121 S.E.2d 564 (1961).

§ **1-507.8. Property sold pending litigation.**—When the property of an insolvent corporation is at the time of the appointment of a receiver encumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the court may order the receiver to sell the same, clear of encumbrance, at public or private sale, for the best price that can be obtained, and pay the money into the court, there to remain subject to the same liens and equities of all parties in interest as was the property before sale to be disposed of as the court directs. And the receiver or receivers making such sale is hereby authorized and directed to report to the resident judge of the district or to the judge holding the courts of the district in which the property is sold, the said sale for confirmation, the said report to be made to the said judge in any county in which he may be at the time; but before acting upon said report, the said receiver or receivers shall publish in some newspaper published in the county or in some newspaper of general circulation in the county, where there is no newspaper published in the county, a notice directed to all creditors and persons interested in said property, that the said receiver will make application to the judge (naming him) at a certain place and time for the confirmation of his said report which said notice shall be published at least ten days before the time fixed therein for the said hearing. And the said judge is authorized to act upon said report, either confirming it or rejecting the sale, and if he rejects the sale it shall be competent for him to order a new sale and the said order shall have the same force and effect as it made at a regular term of the superior court of the county in which the property is situated. (1901, c. 2, s. 86; Rev., s. 1232; C. S., s. 1214; Ex. Sess. 1924, c. 13; 1955, c. 1371, s. 2.)

Section Applicable to Pending Litigation.—The statute is a remedial one and relates only to the method of procedure in dealing with certain assets of an insolvent corporation. Such statutes, unless otherwise limited, are usually held to be applicable to pending litigation, where the language used clearly indicates that such construction was intended by the legislature, and especially where no hardship or injustice results, and the rights of the parties are thereby better secured and protected. Martin v. Vanlaningham, 189 N.C. 656, 127 S.E. 695 (1925).

§ **1-507.9. Compensation and expenses; counsel fees.**—Before distribution of the assets of an insolvent corporation among the creditors or stockholders, the court shall allow a reasonable compensation to the receiver for his services, not to exceed five percent upon receipts and disbursements, and the costs and expenses of administration of his trust and of the proceedings in said court, to be first paid out of said assets. The court is authorized and empowered to allow counsel fees to an attorney serving as a receiver (in addition to the commissions allowed him as receiver as herein provided) where such attorney in behalf of the receivership renders professional services, as an attorney, which are beyond the ordinary routine of a receivership and of a type which would reasonably justify the retention of legal counsel by any such receiver not himself licensed to practice law. (1901, c. 2, s. 88; Rev., s. 1226; C. S., s. 1215; 1955, c. 1371, s. 2; 1967, c. 32.)

Editor's Note. — The 1967 amendment added the second sentence.

The effect of this section is to take from the funds of the insolvent corporation a sufficient sum to pay all the costs, allowances and legitimate expenses, and then to distribute what is left according to priority. Hickson Lumber Co. v. Gay Lumber Co., 150 N.C. 281, 63 S.E. 1048 (1909).

Commissions Limited.—A rate not exceeding five per cent on receipts and five per cent on disbursements is the statutory limit of a receiver's commissions. Battery Park Bank v. Western Carolina Bank, 126 N.C. 531, 36 S.E. 39 (1900).

This section does not state that the receiver is entitled to a five per cent commission upon receipts and disbursements, but reads in part as follows, "the court shall allow a reasonable compensation to the receiver for his services, not to exceed five per cent upon receipts and disbursements." King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

The allowance of commissions and counsel fees to a receiver by the superior court is prima facie correct, and the Supreme Court will not alter or modify the same unless based on the wrong principle, or clearly inadequate or excessive. King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

But Allowance of Costs Is Subject to Review.—That the amount of the allowance of costs by the superior court of attorney's fees is reviewable by the Supreme Court is well settled. King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

It Affects a Substantial Right of Creditors.—The allowance of the costs of administration of a receivership of an insolvent corporation made by a court affects a substantial right of the creditors, in that it disposes of a part of the assets of the insolvent corporation, and is a reduction to that extent of the amounts to which the creditors are entitled under their claims against it. King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

Commission May Be Divided between Parties.—An allowance to a receiver is a part of the costs of the action and usually taxable against the losing party, but the court below may, in its discretion, divide it between the parties, as in case of referees' fees. Simmons v. Allison, 119 N.C. 556, 26 S.E. 171 (1896).

Items Includible in Costs.—Costs of administration of a receivership include, inter alia, such items as the following: 1. Court costs in proceedings relating to the receivership; 2 compensation for the receiver; 3. reasonable and proper compensation for the receiver's attorney for services which require legal knowledge and skill and which were rendered to the receiver for the benefit of the receivership; 4. costs of conserving property, in receivership; 5. costs of sales of property in receivership; 6 premiums for fire insurance on property in receivership; 7. bookkeeping, clerical and accounting expense and postage in connection with the administration of the receivership; 8. payment of all taxes on property real or personal in the possession of the receiver which fall due during the time he is in possession as receiver, or which have accrued upon the property in his possession prior to his appointment King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

Commissions payable to a receiver are part of the costs and expenses of the suit in which he is appointed, and should be paid as such instead of being classed as a debt payable pro rata with other debts. Wilson Cotton Mills v. Randleman Cotton Mills, 115 N.C. 475, 20 S.E. 770 (1894).

Counsel Fees Not Allowed for Collecting Assets of Estate.—A receiver is not entitled to allowance for the services of an attorney in hunting up and taking into possession the property belonging to the estate since it is the personal duty of the receiver to look after such matters. King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

Nor for Duties Not Requiring Legal Skill.—The contacting of purchasers, the showing of property for sale, the sales and resales of property, and the accounting and bookkeeping in respect to the administration of the receivership required no legal knowledge and skill, and are the performance of ordinary duties, which may and should be performed by the receiver himself and are not the subject of an allowance of counsel fees. King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

First Assets Applied to Costs.—Under this section the first assets that are the property of the corporation must be applied to the costs of the proceedings in court, including the fees of the receiver and referee, and, except as to private corporations, receivers' certificates issued in operation of the plant, under the orders of the court, and liabilities incurred for labor, and torts. Hickson Lumber Co. v. Gay Lumber Co., 150 N.C. 281, 63 S.E. 1048 (1909); Humphrey Bros. v. Buell-Crocker Lumber Co., 174 N.C. 514, 93 S.E. 971 (1917).

When Costs Prior to Mortgage.—One who takes a mortgage upon corporation property for money loaned to operate it or to secure other debts, past or prospective, does so with the knowledge that, under this section, the lien of his mortgage is subject to be displaced in favor of the expenses of receivership; but when the corporation has acquired the property subject to a valid registered mortgage, then the costs of receivership are not prior to that mortgage. Humphrey Bros. v. Buell-Crocker Lumber Co., 174 N.C. 514, 93 S.E. 971 (1917).

Allowance of Commissions Held Premature.—The allowance of commissions to receivers appointed by the court, by consent, to finish partially constructed waterworks, was premature before the work was finished, as it could not be determined whether such allowance was excessive or too little. Delafield v. Mercer Constr. Co., 118 N.C. 105, 24 S.E. 10 (1896).

Appeal.—When the order of the court below allowing commissions to a receiver for services as such is appealed from, and there is no suggestion that the amount was excessive or based upon a wrong principle, the order will not be disturbed. Talbot v. Tyson, 147 N.C. 273, 60 S.E. 1125 (1908).

The allowance of commissions and counsel fees to a receiver by the superior court is prima facie correct, and the Supreme Court will alter the same only when it is clearly inadequate or excessive. Graham v. Carr, 133 N.C. 449, 45 S.E. 847 (1903).

§ 1-507.10. Debts provided for, receiver discharged.—When a receiver has been appointed, and it afterwards appears that the debts of the corporation have been paid, or provided for, and that there remains, or can be obtained by further contributions, sufficient capital to enable it to resume its business, the court may, in its discretion, a proper case being shown, discharge the receiver, and decree that the property, rights and franchises of the corporation revert to it, and thereafter the corporation may resume control of the same, as fully as if the receiver had never been appointed. (1901, c. 2, s. 76; Rev., s. 1220; C. S., s. 1216; 1955, c. 1371, s. 2.)

Costs and expenses of receivership are generally limited to taxes and those costs and expenses necessary to preserve the estate for the benefit of all persons interested, and are payable, primarily, out of the fund in the hands of the receiver, but if necessary, out the corpus of the estate in the custody of the court. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Costs of administration include such items as the following: (1) Court costs in proceedings relating to the receivership; (2) compensation for the receiver; (3) compensation for the receiver's attorney; (4) bookkeeping and clerical expense; (5) auditing expense; (6) premiums for fire insurance on property in receivership; (7) compensation for watchmen for services in guarding property in receivership; and (8) costs of sale of property in receivership. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Cost of Administration and Expenses of Operation Distinguished. — See National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Costs of administration are preferred in payment to expenses of operation. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Expenses of Operation Subordinate to Claims of Non-Consenting Lienholders.—Indebtedness incurred by a receiver for the expenses of carrying on and operating the business of an insolvent private concern owing no duty to the public cannot be given priority over the claims of non-consenting lienholders to the corpus of the property. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

The court may charge against the interest of lienholders expenses incurred by the receiver in preserving and selling the property subject to the liens and in applying the cash realized by its sale upon the claims of the lienholders. As a general rule, however, expenses of this character will not be charged against the interests of lienholders where unencumbered assets are available for their payment. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Discharged Receiver Not Proper Party.—Where the receiver of an insolvent railroad company has been discharged, he is not a proper party to an action against a foreclosure purchaser to recover for personal injuries suffered after the receiver's discharge. Howe v. Harper, 127 N.C. 356, 37 S.E. 505 (1900).

§ 1-507.11. Reorganization.—When a majority in interest of the stockholders of the corporation have agreed upon a plan for its reorganization and a resumption by it of the management and control of its property and business, the corporation may, with the consent of the court, upon the reconveyance to it of its property and franchises, either by deed or decree of the court, mortgage the same for an amount necessary for the purposes of the reorganization; and may issue bonds or other evidences of indebtedness, or aditional stock, or both, and use the same for the full or partial payment of the creditors who will accept the same, or otherwise dispose of the same for the purposes of the reorganization. (1901, c. 2, s. 77; Rev., s. 1221; C. S., s. 1217; 1955, c. 1371, s. 2.)

Power of Superior Court.—This section gives the superior court, in a receivership, power to approve a plan for the reorganization of a corporation, which provides for the readjustment of the company's capital structure, when approved by a majority in interest of the stockholders; but it cannot affect either the rights of dissenting stockholders not parties to the receivership, or the vested rights of parties to the proceedings unless they fail to appear. Commercial Nat'l Bank v. Mooresville Cotton Mills, 222 N.C. 305, 22 S.E.2d 913 (1942).

Consent of Creditors Unnecessary.—Where a corporation engaged in business transfers its entire property rights and franchise to a new company incorporated and organized by the same stockholders and directors as the old, and the new company continues the business and adopts the contracts of its predecessor, the effect of such a merger is to create a novation so far as the creditors of the old company are concerned and to substitute the new one as debtor, and in such case it is not necessary to obtain the consent of the creditors of the old company to the change. Friedenwald Co. v. Asheville Tobacco Works & Cigarette Co., 117 N.C. 544, 23 S.E. 490 (1895).

New Corporation Assumes Contracts of Old.—Where, by merger of an old into a new corporation, a novation of the debts of the old is created, the new corporation is, to all intents and purposes, the same body and answerable for its own contracts made under a different name. Friedenwald Co. v. Asheville Tobacco Works & Cigarette Co., 117 N.C. 544, 23 S.E. 490 (1895).

Duty of Fiduciaries.—In the reorganization of a corporation under this section, executors, trustees, and other fiduciaries, holding stock in the corporation, not only have the right, but it is their duty, to assert whatever legal rights they may have which in their opinion will be for the best interest of the estates involved. Commercial Nat'l Bank v. Mooresville Cotton Mills, 222 N.C. 305, 22 S.E.2d 913 (1942).

ARTICLE 39.

Deposit or Delivery of Money or Other Property

§ 1-508. Ordered paid into court.

When Court Will Order Money Delivered to Party. — Where a tenant, upon the uncontroverted facts, is entitled, as a matter of law, to the proceeds of a crop insurance policy paid into court by insurer, free from the landlord's crop lien for advancements, the court has authority under this section to order that such fund be delivered to the tenant. Peoples v. United States Fire Ins. Co., 248 N.C. 303, 103 S.E.2d 381 (1958).

§ 1-510. Defendant ordered to satisfy admitted sum.

This section may not be invoked where its application would give sanction to piecemeal recoveries which would be essentially inconsistent. Universal C.I.T. Credit Corp. v. Saunders, 235 N.C. 369, 70 S.E.2d 176 (1952).

Cited in Wachovia Bank & Trust Co. v. Wilder, 255 N.C. 114, 120 S.E.2d 404 (1961).

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

ARTICLE 40.

Mandamus.

§§ 1-511 to 1-513: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

ARTICLE 41.

Quo Warranto.

§ 1-514. Writs of sci. fa. and quo warranto abolished.—The writs of scire facias and of quo warranto, and proceedings by information in the nature of quo warranto, are abolished; and the remedies obtainable in those forms may be obtained by civil actions under this article. To the extent that rules of procedure are not provided for in this article, the Rules of Civil Procedure shall apply. (R. C., c. 26, ss. 5, 25; C. C. P., s. 362; Code, s. 603; Rev., s. 286; C. S., s. 869; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment added the last sentence.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

This article prescribes a specific mode for trying the title to a public office. Such relief is to be sought in a civil action State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

The title to a public office can only be determined in a direct proceeding brought for that purpose under the statutes incorporated in this article. Corey v. Hardison. 236 N.C. 147, 72 S.E.2d 416 (1952).

§ 1-515. Action by Attorney General.

A private person cannot institute or maintain an action of this character in his own name or upon his own authority even though he be a claimant of the office. The action must be brought and prosecuted in the name of the State by the Attorney General, or in the name of the State upon the relation of a private person, who claims to be entitled to the office, or in the name of the State upon the relation of a private person, who is a citizen and taxpayer of the jurisdiction where the officer is to exercise his duties and powers. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

Applied in State ex rel. Pitts v. Williams, 260, N.C. 168, 132 S.E.2d 329 (1963).

Cited in Edwards v. Board of Educ., 235 N.C. 345, 70 S.E.2d 170 (1952); State ex rel. Tillett v. Mustain, 243 N.C. 564, 91 S.E 2d 696 (1956); Starbuck v. Havelock, 252 N.C. 176, 113 S.E.2d 278 (1960).

§ 1-516. Action by private person with leave.

Prerequisites to Prosecution of Action by Private Person.—Before any private person can commence or maintain an action of this nature in the capacity of a relator, he must apply to the Attorney General for permission to bring the action, tender to the Attorney General satisfactory security to indemnify the State against all costs and expenses incident to the action, and obtain leave from the Attorney General to bring the action in the name of the State upon his relation. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

Judge Cannot Confer Power to Prosecute Action. — Where a relator had no leave from the Attorney General permitting him to sue as such, he was incapacitated by law to prosecute the action and the trial judge could not confer upon him the legal power denied to him by positive legislative enactment through the simple expedient of designating him a party plaintiff and treating his answer as a complaint. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

§ 1-520. Several claims tried in one action.

Stated in State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

§ 1-522. Time for bringing action.

Applied in State ex rel. Long v. Smitherman, 251 N.C. 682, 111 S.E.2d 834 (1960).

§ 1-529. Appeal; bonds of parties.—No appeal by the defendant to the appellate division from the judgment of the superior court in such action shall stay the execution of the judgment, unless a justified undertaking is executed on the part of the appellant by one or more sureties, in a sum to be fixed by the court, conditioned that the appellant will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellant by virtue or under color of the office. In no event shall the judgment be executed pending appeal, unless a justified undertaking is executed on the part of the appellee by one or more persons in a sum to be fixed by the court, conditioned that the appellee will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellee by virtue or under color of office during his occupancy thereof. (1885, c. 406, s. 2; Rev., s. 842; C. S., s. 884; 1969, c. 44, s. 13.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" near the beginning of the section.

§ 1-530. Relator inducted into office; duty.

Cited in Edwards v. Board of Educ., 235 N.C. 345, 70 S.E.2d 170 (1952).

ARTICLE 42.

Waste.

§ 1-533. Remedy and judgment.

Cross Reference.—See note to § 1-538.

No one shall have an action of waste unless he has the immediate estate of inheritance. Edens v. Foulks, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

One entitled to a contingent remainder cannot maintain an action at law against the tenant in possession to recover damages for waste, for the reason that it cannot be known in advance of the happening of the contingency whether the contingent remainderman would suffer damage or loss by the waste; and if the estate never became vested in him, he would be paid for that which he had not lost. Edens v. Foulks, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

An action cannot be maintained by plaintiff a contingent remainderman because, if allowed, the life estate is destroyed by the forfeiture resulting from the waste under the statute, and yet the event upon which the plaintiff is to take his estate in remainder has not happened. Edens v. Foulks, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

If a person's interest is a contingent remainder, such person has no standing to maintain an action for waste and forfeiture under this section. Edens v. Foulks, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

But a contingent remainderman is entitled to an injunction to prevent a person in possession from committing future waste, the action being maintainable for the protection of the inheritance, which is certain, although the persons on whom it may fall are uncertain. Edens v. Foulks, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

Contingent and Vested Remainder Distinguished.—See Edens v. Foulks, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

Section 41-11 Has No Application to Action for Waste.—See note to § 41-11.

§ 1-538. Judgment for treble damages and possession.

Judgment Must Be in Accord with This Section. — In an action by remaindermen against the life tenant for waste under § 1-533, judgment must be in accord with this section, and the court in such action has no authority to order the realty to be sold and the life tenant's share, diminished in the amount of damages awarded by the jury for waste, paid to the life tenant. Parrish v. Parrish, 247 N.C. 584, 101 S.E.2d 480 (1958).

ARTICLE 43.

Nuisance and Other Wrongs.

§ 1-538.1. Damages for malicious or wilful destruction of property by minors.—Any person, firm, corporation, the State of North Carolina or any political subdivision thereof, or any religious, educational or charitable organization, or any nonprofit cemetery corporation, or organization, whether incorporated or unincorporated, shall be entitled to recover damages in an amount not to exceed five hundred dollars ($500.00), in an action in a court of competent jurisdiction, from the parents of any minor under the age of eighteen (18) years, living with its parents, who shall maliciously or wilfully destroy property, real, personal or mixed, belonging to any such person, firm, corporation, the State of North Carolina or any political subdivision thereof, or any religious, educational or charitable organization. (1961, c. 1101.)

Editor's Note.—For comment on this section, see 40 N.C.L. Rev. 619 (1962).

Purpose of Section.—This section and similar statutes appear to have been adopted not out of consideration for providing a restorative compensation for the victims of injurious or tortious conduct of children, but as an aid in the control of juvenile delinquency. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

The rationale of this section apparently is that parental indifference and failure to supervise the activities of children is one of the major causes of juvenile delinquency; that parental liability for harm done by children will stimulate attention and supervision; and that the total effect will be a reduction in the anti-social behavior of children. General Ins Co., of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

The limitation in this section of liability to malicious or wilful acts of children, as well as the limitation of liability to an amount not to exceed $500.00 for the destruction of property fails to serve any of the general compensatory objectives of tort law. General Ins Co of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

It Is Constitutional.—The enactment of this section is within the police power of the State and it is not violative of the provisions of Const., Art I, § 17 or of the provisions of the Fifth Amendment to the federal Constitution. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

And Does Not Violate Parents' Rights.—This section gives to the parents of children a full opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case, which is uniform and regular and in accord with fundamental rules which do not violate fundamental rights. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

It Imposes Vicarious Liability on Parents.—In an action against the parents under this section the complaint is not fatally defective because it fails to allege that any act or omission to act on the part of the defendants was the proximate cause of an injury to plaintiff, for the reason that this section imposes vicarious liability upon parents by virtue of their relationship for the malicious or wilful destruction of property by a child under the age of eighteen living with them. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

Under this section a parent is made responsible for damages in an amount not exceeding $500 resulting from the wilful or malicious acts of a child under 18 living with the parent, S & N Freight Line v. Bundy Truck Lines, 3 N.C. App. 1, 164 S.E.2d 89 (1968).

Unlike Common Law.—At common law, the mere relationship of parent and child was not considered a proper basis for imposing vicarious liability upon the parent for the torts of the child. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

Parental liability for a child's tort at common law was imposed generally in two situations, i.e., where there was an agency relationship, or where the parent was himself guilty in the commission of the tort in some way. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

Necessary Elements to Be Shown.—For the plaintiff to recover from the parents he must establish, inter alia, by the greater weight of the evidence, (1) that the minor was under the age of eighteen years living with his parents, and (2) that the child maliciously or wilfully destroyed property, real, personal, or mixed. General Ins. Co.

of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

Insurer Paying Loss May Sue on Subrogated Claim.—An insurance company, as plaintiff, may bring suit in its own name against defendants upon a claim to which it has become subrogated by payment in full of its loss to its insured under the provisions of its policy of insurance, who pursuant to the provisions of this section would have been able to bring such an action in its own name. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

Application of Section to Automobile Collision Case.—See Smith v. Simpson, 260 N.C. 601, 133 S.E.2d 474 (1963).

§ 1-539.1. Damages for unlawful cutting or removal of timber; misrepresentation of property lines.—(a) Any person, firm or corporation not being the bona fide owner thereof or agent of the owner who shall without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber, shrub or tree therefrom, shall be liable to the owner of said land for double the value of such wood, timber, shrubs or trees so injured, cut or removed.

(b) Any person, firm or corporation cutting timber under contract and incurring damages as provided in subsection (a) of this section as a result of a misrepresentation of property lines by the party letting the contract shall be entitled to reimbursement from the party letting the contract for damages incurred. (1945, c. 837; 1955, c. 594.)

Editor's Note. — The 1955 amendment rewrote this section.

For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

For brief comment on the 1955 amendment, see 33 N.C.L. Rev. 533 (1955).

Cited in Paschal v. Autry, 256 N.C. 166, 123 S.E.2d 569 (1962).

§ 1-539.2. Dismantling portion of building.—When one person owns a portion of a building and another or other persons own the remainder of said building, neither of said owners shall dismantle his portion of said building without making secure the portions of said building belonging to other persons. Any person violating the provisions of this section shall be responsible in damages to the owners of other portions of such building. (1955, c. 1359.)

ARTICLE 43A.

Adjudication of Small Claims in Superior Court.

§ 1-539.3. Small claims defined; to what actions article applies.—The procedure for adjudicating small claims in the superior courts of this State shall be as herein set forth. A small claim is defined as:

(a) An action in which the relief demanded is a money judgment and the sum prayed for (exclusive of interests and costs of court) by the plaintiff, defendant, or other party does not exceed one thousand dollars ($1,000.00), which may include the ancillary remedy of attachment if the property to be attached does not exceed a value of one thousand dollars ($1,000.00); or,

(b) An action in which the relief demanded is the foreclosure of a lien on real or personal property where the sum prayed for does not exceed one thousand dollars ($1,000.00); or,

(c) An action in which the relief demanded is the recovery of personal property of a value not exceeding one thousand dollars ($1,000.00), which may include the ancillary remedy of claim and delivery if the property claimed does not exceed a value of one thousand dollars ($1,000.00); and in which no jury trial is demanded.

This article shall not apply to actions within the jurisdiction of courts of justice of the peace. (1955, c. 1337, s. 1.)

Applied in Jackson v. McCoury, 247 N.C. 502, 101 S.E.2d 377 (1958); Hajoca Corp. v. Brooks, 249 N.C. 10, 105 S.E.2d 10 (1958); Phillips v. Alston, 257 N.C. 255, 125 S.E.2d 580 (1962); R.B. Stokes Concrete Co. v. Warden, 268 N.C. 466, 150 S.E.2d 849 (1966).

Cited in Better Home Furniture Co. v Baron, 243 N.C. 502, 91 S.E.2d 236 (1956); Schloss v. Hallman, 255 N.C. 686, 122 S.E.2d 513 (1961).

§ 1-539.4. Small claims docket; caption of complaint; when value of property to be stated; deposit for costs.—Each clerk of the superior court shall maintain a small claims docket. The clerk shall docket in the small claims docket any action in which the relief demanded is a small claim, as defined above In all such actions the plaintiff shall set forth in the caption of the complaint the words "small claim" If any party demands the foreclosure of a lien on real or personal property the recovery of personal property, or the ancillary remedy of attachment, such party shall, in his pleading or by affidavit, state that the value of the property does not exceed one thousand dollars ($1,000.00) No prosecution bond shall be demanded of plaintiff when instituting a small claims action, but the clerk shall require such advance deposit for costs as the board of county commissioners shall determine but not in excess of the advance deposit for costs as in other actions. (1955. c. 1337, s. 2.)

Action Instituted Prior to Passage of Article.—See note to § 1-539.7.

§ 1-539.5. Jury trial.—No trial jury shall be had in small claims actions, unless a party thereto shall demand a jury trial in the first pleading filed by him provided that in the trial of small claims actions where there is no jury trial, the judge shall not be required to comply with the provisions of G. S. 1-185 unless one of the parties so requests, and such request may be made before or after the verdict; and provided further that when any of the parties to the action are entitled to a judgment by default and inquiry against an adverse party thereto under G. S. 1-212 or G S. 1-213, no jury trial shall be required. (1955, c. 1337 s. 3; 1959 c. 912; 1963, c 468, s. 3.)

Editor's Note. — The 1959 amendment added the first proviso.

The 1963 amendment added the second proviso.

Application of §§ 1-185 to 1-187.—When this article is made applicable to a particular county by appropriate resolution of its board of county commissioners, the right to jury trial in such county may be waived as provided herein To this extent, this article supplements § 1-184. Construing these statutes in pari materia, it is clear that the provisions of §§ 1-185. 1-186 and 1-187 relating to proceedings upon waiver of jury trial under § 1-184, apply equally when a jury trial is waived under this article. Hajoca Corp. v. Brooks, 249 N.C. 10, 105 S.E.2d 10 (1958), decided before the passage of the 1959 amendment to this section.

Waiver.—Defendant's failure to demand a jury trial, as provided by this section, constituted a waiver of that right. Great Am. Ins. Co. v. Holiday Motors of High Point, Inc., 264 N.C. 444, 142 S.E.2d 13 (1965).

Applied in Jackson v. McCoury, 247 N C. 502, 101 S. E. (2d) 377 (1958); Tripp v. Harris, 260 N.C. 200, 132 S.E.2d 322 (1963).

Cited in Anderson v. Cashion, 265 N.C. 555, 144 S.E.2d 583 (1965); Sherrill v. Boyce, 265 N.C. 560, 144 S.E.2d 596 (1965).

§ 1-539.6. Transfer of action to regular civil issue docket.—If the defendant in a small claims action files an answer in which a jury trial is demanded or in which affirmative relief is demanded which is not a small claim, as defined above, the action shall be transferred to the regular civil issue docket. (1955, c 1337, s. 4.)

§ 1-539.7. Civil appeals to superior court placed on small claims docket.—All civil appeals to the superior court from trial courts inferior to the superior court, including civil appeals from courts of justices of the peace, which come within the above definition of a small claim, shall be placed upon the small claims docket, unless at the time the appeal is docketed in the superior court, or within ten days thereafter, a party to the action shall file with the clerk a written demand for a jury trial. (1955, c. 1337, s. 5; 1961, c. 1184.)

Editor's Note. — The 1961 amendment added after the word "court" in line two the words "including civil appeals from courts of justices of the peace."

Section 6 of the act from which this article was derived provides: Any civil action instituted in the superior court, or any civil appeal to the superior court from a trial court inferior to the superior court, which comes within the above definition of a small claim and which was docketed in the superior court prior to July 1, 1955, may be transferred to the small claims docket upon the written request of all parties to the action.

§ 1-539.8. Article applicable only in counties which adopt it.—This article shall apply only to those counties in which the board of county commissioners shall by resolution adopt the provisions hereof. (1955, c. 1337, s. 7.)

ARTICLE 43B.

Defense of Charitable Immunity Abolished.

§ 1-539.9. Defense abolished as to actions arising after September 1, 1967.—The common-law defense of charitable immunity is abolished and shall not constitute a valid defense to any action or cause of action arising subsequent to September 1, 1967. (1967, c. 856.)

Quoted in Habuda v. Trustees of Rex Hosp., 3 N.C. App. 11, 164 S.E.2d 17 (1968); Helms v. Williams, 4 N.C. App. 391, 166 S.E.2d 852 (1969).

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

ARTICLE 44.

Compromise.

§ 1-540. By agreement receipt of less sum is discharge.

I. GENERAL CONSIDERATION

A plea of accord and satisfaction is recognized as a method of discharging a contract or settling a cause of action arising either from a contract or a tort, by substituting for such contract or cause of action an agreement for the satisfaction thereof, and an execution of such substitute agreement. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

What Constitutes Accord and Satisfaction.—See Allgood v. Wilmington Sav & Trust Co., 242 N.C. 506, 88 S.E.2d 825 (1955).

Payment to beneficiary of one half of proceeds of life insurance policy did not constitute accord and satisfaction as a matter of law where beneficiary testified that by virtue of such payment she did not abandon her right to balance of proceeds, and receipt did not expressly state that the sum received was in full settlement. Allgood v Wilmington Sav & Trust Co., 242 N.C. 506, 88 S.E.2d 825 (1955).

Elements of Accord and Satisfaction.—An accord and satisfaction is compounded of two elements: An accord, which is an agreement whereby one of the parties undertakes to give or perform and the other to accept in satisfaction of a claim, liquidated or in dispute, something other than or different from what he is or considers himself entitled to; and a satisfaction, which is the execution or performance of such agreement. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

The accord is the agreement. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

And the satisfaction is the execution or performance of the agreement. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Consideration must in some form or other be present in an accord. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

An accord and satisfaction may be based on an undisputed or liquidated claim. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Accord and Satisfaction Does Not Result from Part Payment of Liquidated and

Undisputed Claim.—The fact that a remittance by check purporting to be "in full" is accepted and used does not result in an accord and satisfaction if the claim involved is liquidated and undisputed, under the generally accepted rule that an accord and satisfaction does not result from the part payment of a liquidated and undisputed claim. The creditor is justified in treating the transaction as merely the act of an honest debtor remitting less than is due under a mistake as to the nature of the contract. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

The question of accord and satisfaction may be one of fact and of law. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E2d 85 (1969).

Distinction between Liquidated and Unliquidated Claims.—There is a well-recognized distinction between liquidated or undisputed claims and unliquidated or disputed ones. Under the common law, an agreement to receive a part of a debt due in lieu of the whole of an undisputed, as distinguished from a disputed debt due, was held to be a nudum pactum as to all in excess of the sum actually paid. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

When Account Deemed Liquidated.—An account is liquidated when the amount thereof has been fixed by agreement or if it can be exactly determined by the application of rules of arithmetic or of law. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

By the words of this section, a compromise and settlement is indicated. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

This section applies as a compromise and settlement when an agreement is made and accepted. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

The word "agreement" implies the parties are of one mind—all have a common understanding of the rights and obligations of the others—there has been a meeting of the minds. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Agreements are reached by an offer by one party and an acceptance by the other. This is true even though the legal effect of the acceptance may not be understood. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

A compromise and settlement must be based upon a disputed claim. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Executed Agreement Terminating Controversy Is a Contract.—Whether denominated accord and satisfaction or compromise and settlement, the executed agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

II. EFFECT OF COMPROMISE OR RECEIPT OF PART IN FULL PAYMENT.

Acts as Complete Discharge.—

Ordinarily when a creditor calls on his debtor or a beneficiary calls on his trustee for an accounting and settlement and the demand is met with an offer of money or property in full discharge of debtor's or trustee's obligation, an acceptance and retention of the thing tendered constitutes a complete discharge, even though the sum or property received is less than the amount actually owing. Prentzas v. Prentzas, 260 N.C. 101, 131 S.E.2d 678 (1963).

Checks Accepted as Settlement, etc.—

In accord with 1st paragraph in original. See Allgood v. Wilmington Sav & Trust Co., 242 N.C. 506, 88 S.E.2d 825 (1955); Fidelity & Cas. Co. v. Nello L. Teer Co., 250 N.C. 547, 109 S.E.2d 171 (1959).

When in case of a disputed account between parties a check is given and received under such circumstances as clearly import that it is intended to be, and is tendered, in full settlement of the disputed items, the acceptance and cashing of the check and the appropriation of the proceeds will be regarded as complete satisfaction of the claim. One party will not be allowed to accept the benefit of the check so tendered and at the same time retain the right to sue for an additional amount. Moore v. Greene, 237 N.C. 614, 75 S.E.2d 649 (1953).

A check given and received by the creditor, which purports to be payment in full of an account, does not preclude the creditor accepting it from showing that in fact it was not in full unless, under the principle of accord and satisfaction, there had been an acceptance of the check in settlement of a disputed account. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C App. 342, 167 S.E.2d 85 (1969).

Retention of Deed and Collection of Rentals.—Where a partnership in real estate held for rentals had title to land purchased with partnership funds and, after demand by one of the two partners for an accounting, one of the pieces of real estate was conveyed to him with the verbal statement that it was in complete settlement, the retention of the deed and the collection of rentals would constitute a settlement regardless of the intent of the grantee partner if he accepted the deed as conveying the property to him in his individual capacity and collected the rentals on the basis of individual ownership, but would not constitute a settlement if he merely retained title for the partnership, offering to account for the rents and profits in the settlement of the partnership affairs. Prentzas v. Prentzas, 260 N.C. 101, 131 S.E.2d 678 (1963).

III. APPLICATION OF SECTION.

Section Held Controlling. — Where a settlement was arrived at between the parties by the terms of which all claims between them were settled by the payment to plaintiff of $10,000 and for which he executed releases in full on all claims against the defendants or either of them, and payment was made by check of defendant on which was plainly typed: "Settlement of all accounts in full as of today November 8, 1954," and the check was endorsed and cashed by plaintiff, this section is clearly applicable and controlling. Jordan Motor Lines v. McIntyre, 157 F. Supp. 475 (M.D.N.C. 1957).

§ 1-540.1. Effect of release of original wrongdoer on liability of physicians and surgeons for malpractice.—The compromise settlement or release of a cause of action against a person responsible for a personal injury to another shall not operate as a bar to an action by the injured party against a physician or surgeon or other professional practitioner treating such injury for the negligent treatment thereof, unless the express terms of the compromise, settlement or release agreement given by the injured party to the person responsible for the initial injury provide otherwise (1961, c. 212.)

Editor's Note.—The act adding this section is effective as of Oct. 1, 1961.

For comment on effect of release given tort-feasor causing initial injury in later action for malpractice against treating physician, see 40 N.C.L. Rev. 88 (1961). For comment on aggravation of injury by treating physicians, see 2 Wake Forest Intra. L. Rev. 91 (1966).

For note on avoidance of releases in personal injury cases in North Carolina, see 5 Wake Forest Intra. L. Rev. 359 (1969).

For case law survey on tort law, see 43 N.C.L. Rev. 906 (1965).

Section does not violate N. C. Const., Art. I, § 1. Galloway v. Lawrence, 263 N.C. 433, 139 S.E.2d 761 (1965).

§ 1-540.2. Settlement of property damage claims arising from motor vehicle collisions or accidents; same not to constitute admission of liability, nor bar party seeking damages for bodily injury or death.—In any claim, civil action, or potential civil action which arises out of a motor vehicle collision or accident, settlement of any property damage claim arising from such collision or accident, whether such settlement be made by an individual, a self-insurer, or by an insurance carrier under a policy of insurance, shall not constitute an admission of liability on the part of the person, self-insurer or insurance carrier making such settlement, which arises out of the same motor vehicle collision or accident. It shall be incompetent for any claimant or party plaintiff in the said civil action to offer into evidence, either by oral testimony or paper writing, the fact that a settlement of the property damage claim arising from such collision or accident has been made; provided further, that settlement made of such property damage claim arising out of a motor vehicle collision or accident shall not in and of itself act as a bar, release, accord and satisfaction, or discharge of any claims other than the property damage claim, unless by the written terms of a properly executed settlement agreement it is specifically stated that the acceptance of said settlement constitutes full settlement of all claims and causes of action arising out of the said motor vehicle collision or accident. (1967, c. 662, s. 1.)

Editor's Note.—Session Laws 1967, c. 662, s. 3, provides that the act shall become effective July 1, 1967, and shall apply to claims and causes of action arising after said date.

§ **1-541**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 68 of the Rules of Civil Procedure (§ 1A-1).

§ **1-542**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 68 of the Rules of Civil Procedure (§ 1A-1).

§ **1-543**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

ARTICLE 44A.

Tender.

§ **1-543.1. Service of order of tender; return.**—In all matters in which it is proper or necessary to make or serve a tender, the clerk of the superior court in the county in which the tender is to be made shall, upon request of the tendering party, direct the sheriff of said county to serve an order of tender, together with the property to be tendered, upon the party or parties upon whom said tender is to be made. In the event said property is incapable of being manually tendered, said order of tender shall so state and service of said order tendering same shall have the same legal effect as if the property had been manually tendered. Within five days after receipt of the order, the sheriff shall make his return thereon, showing upon whom the same was served, the date and hour of service, the property tendered, and whether or not said tender was accepted, or that, after due diligence, the party or parties upon whom service was to be made could not be found within the county. He shall then return said order of tender to the clerk who issued it, and this shall constitute proper tender. Nothing in this section shall be construed to prevent other methods of tender or tender by any party to an action in open court upon any other party to said action. (1965, c. 699.)

ARTICLE 45

Arbitration and Award.

§ **1-544. Agreement for arbitration.**

Provisions of Article are Cumulative and Concurrent.—

The statutory methods of arbitration provide cumulative and concurrent rather than exclusive procedural remedies. Lammonds v. Aleo Mfg. Co., 243 N.C. 749, 92 S.E.2d 143 (1956).

Applicability to Agreement Respecting Future Controversies. —

This article applies only to agreements to arbitrate controversies existing between the parties at the time of the execution of the agreement to adopt this method of settlement. Skinner v. Gaither Corp., 234 N.C. 385, 67 S.E.2d 267 (1951).

When a cause of action has arisen the courts cannot be ousted of their jurisdiction by an agreement, previously entered into, to submit the rights and liabilities of the parties to arbitration or to some other tribunal named in the agreement. Skinner v. Gaither Corp., 234 N.C. 385, 67 S.E.2d 267 (1951); McDonough Constr. Co. v. Hanner, 232 F. Supp. 887 (M.D.N.C. 1964).

Contracts to submit future disputes to arbitration, and thus oust the jurisdiction of the courts, are invalid, and the courts will not specifically, or by indirection, compel performance of such contracts by refusing to entertain a suit until after arbitration. McDonough Constr. Co. v. Hanner, 232 F. Supp. 887 (M.D.N.C. 1964).

Arbitration as Matter of Contract. —

The agreement of the parties to arbitrate is a contract. The relation of the parties is contractual. Their rights and liabilities are controlled by the law of contract. A breach of the contract may give rise to a cause of action for damages, but the contract itself is not a defense against a suit on the cause of action the parties agreed to arbitrate. In an action on the contract the courts will not decree specific performance of the agreement. Neither will they, by indirection, compel specific performance by refusing to entertain the suit until after arbitration is had under the agreement. Skinner v. Gaither Corp., 234 N.C. 385, 67 S.E.2d 267 (1951).

The fact that disputed provisions of a collective labor contract have been arbitrated under the procedure outlined in the contract does not make the question of an accounting for an employee's wages one of arbitration and award under the Uniform Arbitration Act. Nor does the statutory procedure for the voluntary arbitration of labor disputes as contained in G. S. 95-36.1 et seq., preclude maintenance of an action by the employee for such accounting. Lammonds v. Aleo Mfg. Co., 243 N.C. 749, 92 S.E.2d 143 (1956).

At any time before an arbitration award is rendered under the contract, either party may elect to breach his contract and seek his remedy in the tribunal provided by law. McDonough Constr. Co. v. Hanner, 232 F. Supp. 887 (M.D.N.C. 1964).

It would be contradictory and unwise to hold that a contract to arbitrate future disputes is void and unenforceable as being against public policy, and at the same time hold that a breach of the same contract would give rise to an action for damages. McDonough Constr. Co. v. Hanner, 232 F. Supp. 887 (M.D.N.C. 1964).

§ 1-551. Award within sixty days.

"Making" and "Delivery" of Award Distinguished.—The Uniform Arbitration Act treats the "making" of the award and the "delivery" of the award to the parties as two separate and distinct provisions. Poe & Sons v. University of N.C., 248 N.C. 617, 104 S.E.2d 189 (1958).

§ 1-553. Requirement of attendance of witnesses.

Cross Reference.—See §§ 6-52 and 6-55.

§ 1-557. Award in writing and signed by arbitrators.

"Making" and "Delivery" of Award Distinguished.—See note to § 1-551.

§ 1-559. Order vacating award.

An arbitrator must act within the scope of the authority conferred on him by the arbitration agreement, and his award is subject to attack on the ground that he exceeded his authority under a mistake of law and upon other grounds. Calvine Cotton Mills, Inc v Textile Workers Union, 238 N.C. 719, 79 S.E.2d 181 (1953).

§ 1-560. Order modifying or correcting award.

Cited in Calvine Cotton Mills, Inc v Textile Workers Union, 238 N.C. 719, 79 S.E.2d 181 (1953).

ARTICLE 46.

Examination before Trial.

§ **1-568.1**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to depositions and discovery, see Rules 26 to 37 of the Rules of Civil Procedure (§ 1A-1).

§§ **1-568.2 to 1-568.16**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-568.17**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to written interrogatories, see Rule 33 of the Rules of Civil Procedure (§ 1A-1).

§ **1-568.18**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 37 of the Rules of Civil Procedure (§ 1A-1).

§ **1-568.19**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 37 of the Rules of Civil Procedure (§ 1A-1).

§§ **1-568.20 to 1-568.22**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References.—For provisions similar to those of repealed §§ 1-568.20 and 1-568.21, see Rule 30 of the Rules of Civil Procedure (§ 1A-1). As to motion to suppress deposition, see Rule 32 of the Rules of Civil Procedure (§ 1A-1).

§ **1-568.23**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 32 of the Rules of Civil Procedure (§ 1A-1).

§ **1-568.24**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to use of depositions, see Rule 26 of the Rules of Civil Procedure (§ 1A-1).

§ **1-568.25**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 26 of the Rules of Civil Procedure (§ 1A-1).

§§ **1-568.26, 1-568.27**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

ARTICLE 47.

Motions and Orders

§ **1-577**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-578**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to motions generally, see Rule 7 of the Rules of Civil Procedure (§ 1A-1).

§§ **1-579 to 1-584**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

ARTICLE 48

Notices

§ **1-585**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to service of pleadings and other papers, see Rule 5 of the Rules of Civil Procedure (§ 1A-1).

§ **1-586**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to service of pleadings ard other papers, see Rule 5 of the Rules of Civil Procedure (§ 1A-1).

§ 1-587: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to service of pleadings and other papers, see Rule 5 of the Rules of Civil Procedure (§ 1A-1).

§ 1-588: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to service of pleadings and other papers, see Rule 5 of the Rules of Civil Procedure (§ 1A-1).

§ 1-589: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — For provisions similar to those of the repealed section, see Rule 45 of the Rules of Civil Procedure (§ 1A-1).

§ 1-589.1. Withholding information necessary for service on law-enforcement officer prohibited. — When service of subpoena, or any other court process, is sought upon any law-enforcement officer of the State or of any political subdivision thereof pursuant to the provisions of G.S. 1-589, or of any other statute, it shall be unlawful for any officer or employee of the agency by whom the officer sought to be served is employed willfully to withhold the address or telephone number of the officer sought to be served with subpoena or other process. (1967, c. 456.)

§§ 1-590, 1-591: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to service of subpoena, see Rule 45 of the Rules of Civil Procedure (§ 1A-1).

§ 1-592: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

ARTICLE 49.

Time.

§ 1-593. How computed.—The time within which an act is to be done, as provided by law, shall be computed in the manner prescribed by Rule 6 (a) of the Rules of Civil Procedure. (C. C. P., s. 348; Code, s. 596; Rev., s. 887; C. S., s. 922; 1957, c. 141; 1967, c. 954, s. 3.)

Editor's Note. — The 1957 amendment inserted the word "Saturday" in the former last sentence.

The 1967 amendment substituted "in the manner prescribed by Rule 6 (a) of the Rules of Civil Procedure" for "by excluding the first and including the last day," and deleted the former last sentence which read, "If the last day is Saturday, Sunday or a legal holiday, it must be excluded."

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

ARTICLE 50.

General Provisions as to Legal Advertising.

§ 1-597. Regulations for newspaper publication of legal notices, advertisements, etc.

Notwithstanding the provisions of G. S. 1-599, whenever a notice or any other paper, document or legal advertisement of any kind or description shall be authorized or required by any of the laws of the State of North Carolina, heretofore or hereafter enacted, or by any order or judgment of any court of this State to be published or advertised in a newspaper qualified for legal advertising in a county and there is no newspaper qualified for legal advertising as defined in this section in such county then it shall be deemed sufficient compliance with such laws, order or judgment by publication of such notice or any other such paper, document or legal advertisement of any kind or description in a newspaper published in an adjoining county or in a county within the same judicial district, provided, if the clerk of the superior court finds as a fact that such newspaper otherwise meets the requirements of this section and has a general circulation in such county where no newspaper is published meeting the requirements of this section (1939, c. 170, s 1; 1941, c. 96; 1959 c. 350.)

Editor's Note. — The 1959 amendment added the second paragraph to this section As the first paragraph was not affected by the amendment it is not set out.

Notice Ineffective Unless Published as Provided in This Section. — Under this section, the publication of a notice of sale under a power contained in a deed of trust is wholly ineffective unless it is published in a newspaper having a general circulation within the county where the land to be sold is located to subscribers who have actually paid the subscription price therefor. Jones v. Percy, 237 N.C. 239, 74 S.E.2d 700 (1953).

Cited in Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

§ 1-600. Proof of publication of notice in newspaper; prima facie evidence. — (a) Publication of any notice permitted or required by law to be published in a newspaper may be proved by a printed copy of the notice together with an affidavit made before some person authorized to administer oaths, of the publisher proprietor editor, managing editor business or circulation manager, advertising, classified advertising or any other advertising manager or foreman of the newspaper, showing that the notice has been printed therein and the date or dates of publication If the newspaper is published by a corporation, the affidavit may be made by one of the persons hereinbefore designated or by the president vice president, secretary assistant secretary, treasurer, or assistant treasurer of the corporation.

(b) Such affidavit and copy of the notice shall constitute prima facie evidence of the facts stated therein concerning publication of such notice.

(c) The method of proof of publication of a notice provided for in this section is not exclusive, and the facts concerning such publication may be proved by any competent evidence. (1951, c. 1005, s. 2; 1957, c. 204.)

Editor's Note. — The 1957 amendment inserted "managing editor" in line four of subsection (a).

Chapter 1A.

Rules of Civil Procedure.

Sec.

1A-1. Rules of Civil Procedure.

Article 1.

Scope of Rules—One Form of Action.

Rule

1. Scope of rules.
2. One form of action.

Article 2.

Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

3. Commencement of action.
4. Process.
5. Service and filing of pleadings and other papers.
6. Time.

Article 3.

Pleadings and Motions.

7. Pleadings allowed; form of motions.
8. General rules of pleadings.
9. Pleading special matters.
10. Form of pleadings.
11. Signing and verification of pleadings.
12. Defenses and objections — when and how presented—by pleading or motion—motion for judgment on pleading.
13. Counterclaim and crossclaim.
14. Third-party practice.
15. Amended and supplemental pleadings.
16. Pre-trial procedure; formulating issues.

Article 4.

Parties.

17. Parties plaintiff and defendant; capacity.
18. Joinder of claims and remedies.
19. Necessary joinder of parties.
20. Permissive joinder of parties.
21. Procedure upon misjoinder and nonjoinder.
22. Interpleader.
23. Class actions.
24. Intervention.
25. Substitution of parties upon death, incompetency or transfer of interest; abatement.

Article 5.

Depositions and Discovery.

26. Depositions in a pending action.
27. Depositions before action or pending appeal.
28. Persons before whom depositions may be taken.

Sec.

29. Stipulations regarding the taking of depositions.
30. Depositions upon oral examinations.
31. Depositions of witnesses upon written interrogatories.
32. Errors and irregularities in depositions.
33. Interrogatories to parties.
34. Discovery and production of documents and things for inspection, copying, or photographing.
35. Physical and mental examination of persons.
36. Admission of facts and of genuineness of documents.
37. Failure to make discovery; consequences.

Article 6.

Trials.

38. Jury trial of right.
39. Trial by jury or by the court.
40. Assignment of cases for trial; continuances.
41. Dismissal of actions.
42. Consolidation; separate trials.
43. Evidence.
44. Proof of official record.
45. Subpoena.
46. Objections and exceptions.
47. Jurors.
48. Juries of less than twelve — majority verdict.
49. Verdicts.
50. Motion for a directed verdict and for judgment notwithstanding the verdict.
51. Instructions to jury.
52. Findings by the court.
53. Referees.

Article 7.

Judgment.

54. Judgments.
55. Default.
56. Summary judgment.
57. Declaratory judgments.
58. Entry of judgment.
59. New trials; amendment of jugments.
60. Relief from judgment or order.
61. Harmless error.
62. Stay of proceedings to enforce a judgment.
63. Disability of a judge.

Article 8.

Miscellaneous.

64. Seizure of person or property.
65. Injunctions.

Sec.
66. Omitted.
67. Omitted.
68. Offer of judgment and disclaimer.
68.1. Confession of judgment.
69. Omitted.
70. Judgment for specific acts; vesting title.
71-83. Omitted.
84. Forms.

Effective Date. — Section 10 of c. 954, Session Laws 1967, as amended by Session Laws 1969, c. 803, makes this chapter effective Jan. 1, 1970.

§ 1A-1. Rules of Civil Procedure.—The Rules of Civil Procedure are as follows:

Editor's Note.—Chapter 1A of the General Statutes was added by c. 954, Session Laws 1967. Sections 5, 6 and 7 of c. 954 read as follows:

Sec. 5. All those portions of chapter 1 of the General Statutes of North Carolina not repealed by this act, not amended by this act, or not in conflict with this act, are hereby reenacted.

Sec. 6. All provisions of the General Statutes of North Carolina which refer to sections repealed or amended by this act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose.

Sec. 7. None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, to read as follows: "*Sec. 10.* This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after date."

ARTICLE 1.

Scope of Rules—One Form of Action.

Rule 1. Scope of rules.

These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute. (1967, c. 954, s. 1.)

Comment. — This rule gives literal expression to the scope of intended application, but that scope can be appreciated only by a consideration of the rules themselves and the new jurisdiction statute (§ 1-75.1 et seq.), the statutes left undisturbed by Session Laws 1967, c. 954, the statutes amended in s. 3 of c. 954, and those statutes repealed in s. 4 of c. 954. In general it can be said that to the extent a specialized procedure has heretofore governed, it will continue to do so.

Editor's Note.—For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1.

Rule 2. One form of action.

There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action. (1967, c. 954, s. 1.)

Comment. — This rule, drawn substantially without change from North Carolina Const., Art. IV, § 1, and from former § 1-9, preserves the fundamental reform of 1868, providing for the abolition of the forms of action and for the fusion of law and equity.

ARTICLE 2.

Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

Rule 3. Commencement of action.

A civil action is commenced by filing a complaint with the court. The clerk shall enter the date of filing on the original complaint, and such entry shall be prima facie evidence of the date of filing.

A civil action may also be commenced by the issuance of a summons when

(1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and

(2) The court makes an order stating the nature and purpose of the action and granting the requested permission.

The summons and the court's order shall be served in accordance with the provisions of Rule 4. When the complaint is filed it shall be served in accordance with the provisions of Rule 4 or by registered mail if the plaintiff so elects. If the complaint is not filed within the period specified in the clerk's order, the action shall abate. (1967, c. 954, s. 1.)

Comment. — Any system of procedure must provide an easily identifiable moment in time when it is possible definitely to say that an action has been "commenced." Under prior practice, former §§ 1-14 and 1-88 combined to say that in most cases an action was commenced with the issuance of summons. The exceptions related to actions in which service of summons was made by publication or was made outside the State pursuant to former §§ 1-98 and 1-104. In those cases, actions were deemed commenced when the affidavit required by these sections was filed. Under the federal rules, an action is commenced with the filing of a complaint with the court.

As can be seen, the General Statutes Commission preferred for the usual case the federal rule. The Commission did so because it wished to take away the special consideration then accorded out-of-state defendants. But more importantly the Commission wished to remove a potential trap for an unwary plaintiff in a North Carolina federal court. A recent case in the Eastern District is illustrative. A plaintiff filed a complaint in the federal court for wrongful death five days before the statute of limitations had run. Because of a failure to post the required bond, summons was not issued until over a month later. The defendant moved to dismiss, relying on the statute. The plaintiff, of course, was relying on the federal rule as he was plainly in time if that rule applied. But the federal court quite properly held that the federal rule did not apply and that North Carolina practice as to when an action was commenced would govern. Thus the action was dismissed. Rios v. Drennan, 209 F. Supp. 927 (E.D.N.C. 1962). The court was faithfully following the United States Supreme Court's decision in Erie R.R. v. Tompkins, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938) and its progeny, particularly Ragan v. Merchants Transf. & Warehouse Co., 337 U.S. 530, 69 Sup. Ct. 1233, 93 L. Ed. 1520 (1949). The basic notion of the Rios and Ragan cases is that a federal court, irrespective of the federal rules, cannot give to a claim in a diversity action a "longer life . . . than it would have had in the state court . . ." While one may sympathize with the plaintiff in the Rios case in his reliance on the federal rule, still it is clear that his reliance was misplaced. The trap which ensnared him would exist so long as the federal and State practices varied. The Commission believed this variance should be eliminated.

The Commission was not unmindful of the fact that there may be emergencies in which there is no time to prepare a complaint. To take care of these situations, the Commission incorporated in the second paragraph the essence of the first part of former § 1-121, allowing the commencement of an action by the issuance of a summons on application for permission to delay filing of a complaint and an appropriate order by the clerk.

It will be observed that the Commission did not at this point make any provision for discovery prior to filing a complaint. That problem is dealt with in Rule 27 (b) which provides in appropriate cases for discovery without action.

The second sentence of the first paragraph provides the same method formerly provided by § 1-88.1 for making a prima facie case in respect to the date of filing of the complaint. Rule 4 (a) makes that method available also in respect to the date of issuance of a summons.

Editor's Note.—For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965). For case law survey as to statute of limitations, see 44 N.C.L. Rev. 906 (1966).

For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1. For article on jurisdiction and process, see 5 Wake Forest Intra. L. Rev. 46.

As to meaning of word "issue" in relation to summons as affecting commencement of actions, see Williams v. Bray, 273 N.C. 198, 159 S.E.2d 556 (1968), decided under former § 1-88.

Issuance Does Not Confer Jurisdiction.—If there has been no service of summons and no waiver by appearance, the court has no jurisdiction, and any judgment rendered would be void. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966), decided under former § 1-14.

But Personal Service, Acceptance of Service, or Voluntary Appearance Gives Jurisdiction.—When the defendant has been duly served with summons personally within the State, or has accepted service or has voluntarily appeared in court, jurisdiction over the person exists, and the court may proceed to render a personal judgment against the defendant. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966), decided under former § 1-14.

When Summons Sufficient to Confer Jurisdiction.—To confer jurisdiction, the process relied on must in fact issue from the court and show upon its face that it emanated therefrom and was intended to bring the defendant into court to answer the complaint of the plaintiff. And when this is clearly shown by evidence appearing on the face of the summons, ordinarily the writ will be deemed sufficient to meet the requirements of due process and bring the party served into court, and formal defects appearing on the face of the record will be treated as nonjurisdictional irregularities, subject to amendment. If, however, there is nothing upon the face of the paper which stamps upon it unmistakably an official character, it is not a defective summons but no summons at all. Beck v. Voncannon, 237 N.C. 707, 75 S.E.2d 895 (1953), decided under former § 1-89.

The issuance of a summons is not a judicial act which must be performed by the clerk in person, but rather it is a ministerial act which may be done in his name by a deputy. Beck v. Voncannon, 237 N.C. 707, 75 S.E.2d 895 (1953), decided under former § 1-89.

Conflict of Laws.—In an action in a United States district court in North Carolina for wrongful death under the Louisiana wrongful death statute, the procedural law of North Carolina and not the Federal Rules of Civil Procedure determined when the action was commenced. Rios v. Drennan, 209 F. Supp. 927 (E.D.N.C. 1962), decided under former § 1-14.

Rule 4. Process.

(a) *Summons—issuance; who may serve.*—Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days. The complaint and summons shall be delivered to some proper person for service. In this State, such proper person shall be the sheriff of the county where service is to be made or some other person duly authorized by law to serve summons. Outside this State, such proper person shall be anyone who is not a party and is not less than 21 years of age or anyone duly authorized to serve summons by the law of the place where service is to be made. Upon request of the plaintiff separate or additional summons shall be issued against any defendants. A summons is issued when, after being filled out and dated, it is signed by the officer having authority to do so. The date the summons bears shall be prima facie evidence of the date of issue.

(b) *Summons—contents.*—The summons shall run in the name of the State and be dated and signed by the clerk, assistant clerk, or deputy clerk of the court in the county in which the action is commenced. It shall contain the title of the cause and the name of the court and county wherein the action has been commenced. It shall be directed to the defendant or defendants and shall notify each defendant to appear and answer within 30 days after its service upon him and further that if he fails so to appear, the plaintiff will apply to the court for the relief demanded in the complaint. It shall set forth the name and address of plaintiff's attorney, or if there be none, the name and address of plaintiff.

(c) *Summons—return.*—Personal service or substituted personal service of summons as prescribed by Rule 4 (j) (1) a and b, must be made within 30 days after the date of the issuance of summons, except that in tax and assessment foreclosures under G.S. 105-391 or G.S. 105-414 the time allowed for service is 60 days. But failure to make service within the time allowed shall not invalidate the summons. If the summons is not served within the time allowed upon every party named in the summons, it shall be returned immediately upon the expiration of such time by the officer to the clerk of the court who issued it with notation thereon of its nonservice and the reasons therefor as to every such party not served, but failure to comply with this requirement shall not invalidate the summons.

(d) *Summons—extension; endorsement, alias and pluries.* — When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by either of the following methods of extension:

(1) The plaintiff may secure an endorsement upon the original summons for an extension of time within which to complete service of process. Return of the summons so endorsed shall be in the same manner as the original process. Such endorsement may be secured within 90 days after the issuance of summons or the date of the last prior endorsement, or

(2) The plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement.

Provided, in tax and assessment foreclosures under G.S. 105-391 and G.S. 105-414, the first endorsement may be made at any time within two years after the issuance of the original summons, and subsequent endorsements may thereafter be made as in other actions; or an alias or pluries summons may be sued out at any time within two years after the issuance of the original summons, and after the issuance of such alias or pluries summons, the chain of summonses may be kept up as in any other action.

Provided, further, the methods of extension may be used interchangeably in any case and regardless of the form of the preceding extension.

(e) *Summons—discontinuance.*—When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4 (d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.

(f) *Summons—date of multiple summonses.*—If the plaintiff shall cause separate or additional summonses to be issued as provided in Rule 4 (a), the date of issuance of such separate or additional summonses shall be considered the same as that of the original summons for purposes of endorsement or alias summons under Rule 4 (d).

(g) *Summons—docketing by clerk.*—The clerk shall keep a record in which he shall note the day and hour of issuance of every summons, whether original, alias, pluries, or endorsement thereon. When the summons is returned, the clerk shall note on the record the date of the return and the fact as to service or nonservice.

(h) *Summons—when proper officer not available.*—If at any time there is not in a county a proper officer, capable of executing process, to whom summons or other process can be delivered for service, or if a proper officer refuses or neglects to execute such process, or if such officer is a party to or otherwise interested in the action or proceeding, the clerk of the issuing court, upon the facts being verified before him by written affidavit of the plaintiff or his agent or attorney, shall appoint some suitable person who, after he accepts such process for service, shall execute such process in the same manner, with like effect, and subject to the same liabilities, as if such person were a proper officer regularly serving process in that county.

(i) *Summons—amendment.*—At any time, before or after judgment, in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued.

(j) *Process—manner of service to exercise personal jurisdiction.*—In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process shall be as follows:

(1) Natural Person.—Except as provided in subsection (2) below, upon a natural person:
  a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or
  b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

(2) Natural Person Under Disability.—Upon a natural person under disability by serving process in any manner prescribed in this section (j) for service upon a natural person and, in addition, where required by paragraph a or b below, upon a person therein designated.
  a. Where the person under disability is a minor, process shall be served separately in any manner prescribed for service upon a natural person upon a parent or guardian having custody of the child, or if there be none, upon any other person having the care and control of the child. If there is no parent, guardian, or other person having care and control of the child when service is made upon the child, then service of process must also be made upon a guardian ad litem who has been appointed pursuant to Rule 17.
  b. If the plaintiff actually knows that a person under disability is under guardianship of any kind, process shall be served separately upon his guardian in any manner applicable and appropriate under this section (j). If the plaintiff does not actually know that a guardian has been appointed when service is made upon a person known to him to be incompetent to have charge of his affairs, then service of process must be made upon a guardian ad litem who has been appointed pursuant to Rule 17.

(3) The State.—Upon the State by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney general.

(4) An Agency of the State.—
  a. Upon an agency of the State by personally delivering a copy of the summons and of the complaint to the process agent appointed by the agency in the manner hereinafter provided.
  b. Every agency of the State shall appoint a process agent by filing with the Attorney General the name and address of an agent upon whom process may be served.
  c. If any agency of the State fails to comply with paragraph b above, then service upon such agency may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney general.
  d. For purposes of this rule, the term "agency of the State" in-

cludes every agency, institution, board, commission, bureau, department, division, council, member of Council of State, or officer of the State government of the State of North Carolina, but does not include counties, cities, towns, villages, other municipal corporations or political subdivisions of the State, county or city boards of education, other local public districts, units, or bodies of any kind, or private corporations created by act of the General Assembly.

(5) Counties, Cities, Towns, Villages and Other Local Public Bodies.—

a. Upon a city, town, or village by personally delivering a copy of the summons and of the complaint to its mayor, city manager or clerk.

b. Upon a county by personally delivering a copy of the summons and of the complaint to its county manager or to the chairman, clerk or any member of the board of commissioners for such county.

c. Upon any other political subdivision of the State, any county or city board of education, or other local public district, unit, or body of any kind (i) by personally delivering a copy of the summons and of the complaint to an officer or director thereof, or (ii) by personally delivering a copy of the summons and of the complaint to an agent or attorney in fact authorized by appointment or by statute to be served or to accept service in its behalf.

d. In any case where none of the officials, officers or directors specified in paragraphs a, b and c can, after due diligence, be found in the State, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof, such court or judge may grant an order that service upon the party sought to be served may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or any deputy or assistant attorney general of the State of North Carolina.

(6) Domestic or Foreign Corporation.—Upon a domestic or foreign corporation:

a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service or process or by serving process upon such agent or the party in a manner specified by any statute.

(7) Partnerships.—Upon a general or limited partnership:

a. By delivering a copy of the summons and of the complaint to any general partner, or to any attorney in fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf or by leaving copies thereof in the office of such general partner, attorney in fact or agent with the person who is apparently in charge of the office.

b. If relief is sought against a partner specifically, a copy of the summons and of the complaint must be served on such partner as provided in this section (j).

(8) Other Unincorporated Associations and Their Officers.—Upon any unincorporated association, organization, or society other than a partnership:

a. By delivering a copy of the summons and of the complaint to an officer, director, managing agent or member of the governing body of the unincorporated association, organization or society, or by leaving copies thereof in the office of such officer, director, managing agent or member of the governing body with the person who is apparently in charge of the office; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

(9) Alternative Method of Service on Party That Cannot Otherwise Be Served or Is Not Inhabitant of or Found Within State.—Any party that cannot after due diligence be served within this State in the manner heretofore prescribed in this section (j), or that is not an inhabitant of or found within this State, or is concealing his person or whereabouts to avoid service of process, or is a transient person, or one whose residence is unknown, or is a corporation incorporated under the laws of any other state or foreign country and has no agent authorized by appointment or by law to be served or to accept service of process, service upon the defendant may be made in the following manner:

a. Personal service outside State.—Personal service may be made on any party outside this State by anyone authorized by section (a) of this rule and in the manner prescribed in this section (j) for service on such party within this State. Before judgment by default may be had on such service, there shall be filed with the court an affidavit of service showing the circumstances warranting the use of personal service outside this State and proof of such service in accordance with the requirements of G.S. 1-75.10 (1).

b. Registered mail.—Any party subject to service of process under this subsection (9) may be served by mailing a copy of the summons and complaint, registered mail, return receipt requested, addressed to the party to be served. Service shall be complete on the day the summons and complaint are delivered to the addressee, but the court in which the action is pending shall, upon motion of the party served, allow such additional time as may be necessary to afford the defendant reasonable opportunity to defend the action. Before judgment by default may be had on such service, the serving party shall file an affidavit with the court showing the circumstances warranting the use of service by registered mail and averring (i) that a copy of the summons and complaint was deposited in the post office for mailing by registered mail, return receipt requested, (ii) that it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee and (iii) that the genuine receipt or other evidence of delivery is attached. This affidavit shall be prima facie evidence that service was made on the date disclosed therein in accordance with the requirements of this paragraph, and shall also constitute the method of proof of service of process when the party appears in the action and challenges such service upon him.

c. Service by publication.—A party subject to service of process under this subsection (9) may be served by publication whenever the party's address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained, or there has been a diligent but unsuccessful attempt to serve the party under either paragraph a or under paragraph b or under paragraphs a and b of this subsection (9). Service of process by publication shall consist of publishing a notice of service of process by publication in a newspaper qualified for legal advertising in accordance with G.S. 1-597, 1-598, and published in the county where the action is pending or, if no qualified newspaper is published in such county, then in a qualified newspaper published in an adjoining county, or in a county in the same judicial district, once a week for three successive weeks. If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10 (2) and the circumstances warranting the use of service by publication.

The notice of service of process by publication shall (i) designate the court in which the action has been commenced and the title of the action which title may be indicated sufficiently by the name of the first plaintiff and the first defendant; (ii) be directed to the defendant sought to be served; (iii) state either that a pleading seeking relief against the person to be served has been filed or has been required to be filed therein not later than a date specified in the notice; (iv) state the nature of the relief being sought; (v) require the defendant being so served to make defense to such pleading, within 40 days after a date stated in the notice, exclusive of such date, which date so stated shall be the date of the first publication of notice, or the date when the complaint is required to be filed, whichever is later, and notify the defendant that upon his failure to do so the party seeking service of process by publication will apply to the court for the relief sought; (vi) be subscribed by the party seeking service or his attorney and give the post-office address of such party or his attorney; and (vii) be substantially in the following form:

NOTICE OF SERVICE OF PROCESS BY PUBLICATION
STATE OF NORTH CAROLINA
.... COUNTY
In the .... Court

[Title of action or special proceeding] To [Person to be served]:

Take notice that A pleading seeking relief against you (has been filed) (is required to be filed not later than ...., 19....) in the above-entitled (action) (special proceeding). The nature of the relief being sought is as follows: (State nature.)

You are required to make defense to such pleading not later than (........, 19....) and upon your failure to do so the party seeking service against you will apply to the court for the relief sought.

This, the .... day of ...., 19.....

.... (Attorney) (Party)
.... (Address)

d. Alternative provisions for service in a foreign country.—Where service under this subsection (9) is to be effected upon a party in a foreign country, in the alternative service of the summons and complaint may be made (i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (ii) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (iii) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer or a managing or general agent; or (iv) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (v) as directed by order of the court. Service under (iii) or (v) may be made by any person authorized by section (a) of this rule or who is designated by order of the court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service. Proof of service may be made as prescribed in G.S. 1-75.10, the order of the court or paragraph b hereof, in which case there shall be included an affidavit or certificate of addressing and mailing by the clerk of the court, or by the law of the foreign country.

e. Attack on judgment by default.—No party served under this subsection (9) may attack any judgment by default entered on such service on the ground that service, as required by this section (j), should or could have been effected, with or without due diligence, under some other subsection of this section (j) or under a different paragraph of this subsection (9).

(k) *Process—manner of service to exercise jurisdiction in rem or quasi in rem.*—In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for the exercise of jurisdiction in rem or quasi in rem as provided in G.S. 1-75.8, the manner of service of process shall be as follows:

(1) Defendant Known.—If the defendant is known, he may be served in the appropriate manner prescribed for service of process in section (j).

(2) Defendant Unknown.—If the defendant is unknown, he may be designated by description and process may be served by publication in the manner provided in section (j). (1967, c. 954, s. 1; 1969, c. 895, ss. 1-4.)

Comment. — Preliminarily, it should be remarked that this rule is complementary to the jurisdiction statute (§ 1-75.1 et seq.) which the General Statutes Commission proposed for consideration contemporaneously with these rules. Both the statute and this rule are designed to take full advantage of the fairly recent developments in the law of jurisdiction. Generally, the statute prescribes the occasions on which North Carolina courts may exercise jurisdiction or, in other words, the grounds of jurisdiction. This rule, on the other hand, deals with the manner in which jurisdiction is exercised or asserted.

Section (a).—This section contemplates a continuance of the present practice of ordinarily having summons issue simultaneously with the filing of the complaint. The five-day period was inserted to mark the outer limits of tolerance in respect to delay in issuing the summons.

The first two sentences avoid any suggestion that the clerk shall personally deliver the summons to a process officer. North Carolina has operated successfully heretofore under language similar to that in the section and presumably will continue to be able to do so. The words "be issued" are inserted in lieu of the word "issue" for consistency.

Since under section (b) the summons is to be directed to the defendant rather than to a process officer, it is incumbent on the plaintiff to select the appropriate process officer. It will further be observed that no change is made as to who is a process officer in North Carolina.

For service outside the State, it seemed that the Commission might safely rely on the law of the place where service is attempted. Thus, in New York, where private service of process is permissible, a North Carolina plaintiff could employ a private person to serve process.

It should be noticed that no formalities of any kind are necessary to authorize service anywhere, in or out of the State.

Section (b).—The Commission has mentioned already the principal change in the content of the summons; that is, that it shall be directed to the defendant rather than to a process officer. This makes it possible for one version of the summons to suffice wherever it is served, whether in this State or beyond its bounds. Service, however, must still be made by a proper person as defined by section (a).

Other changes are minor. The Commission abandoned the requirement contained in former § 1-89 that summons operative outside the county of issuance bear the seal of the issuing court. The Commission added specific requirements that summons bear the title of the action, the name of the issuing court, and the name and address of the plaintiff's attorney or, if there is no attorney, the name and address of the plaintiff.

Section (c). — The provisions for the return of summons are the same as those now prescribed except that the Commission extended the time in which a summons may be served to thirty (30) days whereas former § 1-89 prescribed a period of only twenty (20) days. The Commission entertained some question of whether or not the period for service might be still further enlarged but in any event it agreed hat it would serve the interest of convenience for the summons to retain its full effectiveness for at least thirty (30) days. Thereby, the unnecessary exertion of securing an alias or pluries summons can frequently be avoided.

Section (d).—This section preserves unchanged the essence of former § 1-95. Alternative methods, either endorsement or the issuance of alias or pluries summons, are provided for continuing the life of an action after the time for service of summons has expired. The same time limits for securing the endorsement or alias or pluries summons are prescribed and the special treatment accorded tax suits is retained.

Section (e).—This section is similar to former § 1-96. Accordingly, an action will be discontinued under the new rules just as formerly. It will be observed that while under Rule 3 the commencement of an action is ordinarily tied to the filing of a complaint, the discontinuance of an action is tied to the failure in apt time to secure an endorsement or an alias or pluries summons. Further, it will be observed that in the special case of an action in which endorsement or the issuance of an alias or pluries summons is secured after the ninety (90) day period, in that case the action will be deemed commenced with the endorsement or the issuance of summons rather than with the filing of a complaint.

Section (f).—Self-explanatory.

Section (g).—Self-explanatory.

Section (h).—This section deals with the problem of the proper person to make service when for stated reasons action by the sheriff in a particular county may not be satisfactory. Formerly, § 1-91 provided for service by the sheriff of an adjoining county when there was not in the county where service was expected to be made a "proper officer" for service or in the case where a sheriff "neglects or refuses" to make service. Section 152-8 empowers the coroner when there is no person "qualified to act as sheriff" to execute all process While the Commission proposed to leave § 152-8 in effect (§ 1-91 is repealed) it believed that the problem could be taken care of generally by the simple provisions of this section. The procedure outlined by the section does not differ in kind from that prescribed by § 152-8 when the coroner is interested in any action.

Section (i). — This section, in terms does not provide for any greater liberality of amendment than did former § 1-163 which authorized the court to "amend any . . . process . . . by correcting a mistake in the name of a party, or a mistake in any other respect. . . ." But is does direct attention to what in the Commission's judgment should be the controlling factor: Is there material prejudice to substantial rights?

Section (j).—Some substantial change were proposed in respect to the manner o service to exercise personal jurisdictio and they cannot be fully understood without considering the jurisdiction statute (1-75.1 et seq.) and the ideas advanced i the commentary thereto. But it perhap bears emphasis that in the vast majority of cases service is accomplished just as i then was; that is, by a sheriff or his deputy personally delivering a copy of th summons to the defendant and to an off cer, director, managing agent or proces agent when a partnership or corporation is the defendant.

Subsection (1) a.—This deals with natural persons except those under a disability. As indicated above, the normal procedure, when service is made within this State, will be delivery of summons and complaint to the defendant personally by the sheriff or other proper person as defined in section (a). When service is made outside the State, then service will be accomplished on delivery to the defendant personally of a copy of the summons and complaint by one authorized to serve process under the law of the place of service. Thus, if grounds exist under the jurisdiction statute (§ 1-75.1 et seq.) for the exercise or jurisdiction by a court of this State and if the defendant is in New York, since New York permits service by anyone over 18 years of age, the summons and complaint can be effectively served in New York by such a person. In the familiar case of the nonresident motorist, for example, the plaintiff's lawyer would simply place the summons and complaint in the hands of a New York process server. No special prayer for permission to make service in this manner is required nor is there any requirement that service be made on any functionary in North Carolina.

Subsection (1) b.—Here there is limited authorization for substituted service. While no permission of the court is required for resort to this type of service, it cannot be overemphasized that this type of service is available only when service cannot "with reasonable diligence" be made under paragraph a. A party would thus, if at all possible, prefer to effect service under paragraph a. If he does not, he faces the hazard in those cases where the defendant makes no appearance that a court will later find that service could "with reasonable diligence" have been made under paragraph a and the voiding of any judgment obtained. But although a party is faced with some uncertainty when he resorts to paragraph b, he surely would prefer this uncertainty to not being able to sue at all. Nor, in the absence of the defendant, is it possible altogether to relieve the uncertainty.

Subsection (1) c.—This is a continuation of the basic theme of giving the best notice to a defendant consistent with "reasonable diligence." If service may not be had under either paragraph a or paragraph b, then resort may be had to publication and mailing. Again, it is not necessary to have the court's permission for such service, but there must be filed with the court an affidavit that the defendant cannot be served under paragraphs a or b.

It will be observed that the defendant has until forty days after publication of the notice to answer. This will be the controlling time regulation, irrespective of Rule 12 (a). The action will have commenced, of course, with the filing of the complaint.

Subsection (1) d.—Self-explanatory.

Subsection (2). — This subsection attempts to insure that a person under disability and anyone who may have custody of such person shall both be served except in the case of a minor 14 years of age and older. Paragraph b is an attempt to alleviate the situation where there is an unknown guardian. This section requires of the plaintiff what current decisions of the Supreme Court of the United States do. See Covey v. Town of Somers, 351 U.S. 141, 76 S. Ct. 724, 100 L. Ed. 1021 (1956).

Subsection (3).—Self-explanatory.

Subsection (4).—The Commission here proposed that State agencies be required to appoint process agents. The utility of this requirement is obvious. The definition of the term "agency of the State" gave the Commission some difficulty but the Commission believes the definition arrived at is a workable one.

Subsection (5). — Only paragraph d would seem to require comment. Isolated cases had been reported to the Commission where such a provision would be useful.

Subsection (6). — It should be emphasized that this subsection, along with the rest of this rule, is to be read in conjunction with the jurisdiction statute (§ 1-75.1 et seq.). Here we are dealing only with the manner of asserting jurisdiction. Service of a corporate officer within this State or elsewhere will not suffice to give jurisdiction unless there is a ground for jurisdiction as specified by the jurisdiction statute.

Paragraphs c and d in essence make available all present methods of obtaining service.

Subsection (7).—Self-explanatory.

Subsection (8). — It perhaps should be said here that this subsection does not deal in any way with the problem of capacity to be sued.

Section (k).—Here it will be seen that for in rem jurisdiction, as well as for in personam jurisdiction, the Commission proposed the best notice possible to the defendant consistent with "reasonable diligence." Thus, personal service is required where reasonably possible. If it is not reasonably possible, then substituted service may be resorted to. If substituted service is not possible, then service by publication may be had.

Editor's Note. — The 1969 amendment substituted "made" for "attempted" in the third sentence and rewrote the fourth sentence of section (a) and rewrote subsections (1), (2), (6), (7) and (8) and added subsection (9) of section (j).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

The cases cited in this note were decided under former §§ 1-14, 1-88, 1-88.1, 1-89, 1-94, 1-95 and 1-96.

For article on jurisdiction and process, see 5 Wake Forest Intra. L. Rev. 46.

Requirements of Due Process. — Due process of law requires that a defendant shall be properly notified of the proceeding against him, and have an opportunity to be present and to be heard. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

Purpose of Service of Summons.—The purpose of service of summons is to give notice to the party against whom the proceedings or action is commenced, and any notification which reasonably accomplishes that purpose answers the claims of law and justice. Morton v. Blue Ridge Ins. Co., 250 N.C. 722, 110 S.E.2d 330 (1959), citing Jester v. Baltimore Steam Packet Co., 131 N.C. 54, 42 S.E. 447 (1902).

Necessity for Service of Process.—Service of summons, unless waived, is a jurisdictional requirement. Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N.C. 791, 127 S.E.2d 573 (1962).

Delivery of Summons to Defendants.—Delivery of copy of summons and the complaint to the male defendant with instructions to him to deliver it to the feme defendant, his wife, is not valid service on the feme. Harrington v. Rice, 245 N.C. 640, 97 S.E.2d 239 (1957).

Service on Additional Party.—Former § 1-95 related solely to the maintenance of chain of process against an original defendant not properly served, and had no application to the service of process upon an additional party after service had been had on the original defendant. Cherry v. Woolard, 244 N.C. 603, 94 S.E.2d 562 (1956).

Purpose of Keeping up Chain of Summonses.—The real purpose of the provisions of law with respect to keeping up the chain of summonses is to maintain the original date of the commencement of the action where the suit may be affected by the running of a statute of limitations, the pendency of another action or the time limit of an enabling act. Morton v. Blue Ridge Ins. Co., 250 N.C. 722, 110 S.E.2d 330 (1959).

Summons Never Delivered to Officer to Whom Directed. — Where a summons is issued by a clerk of the superior court and such summons is never delivered to the officer to whom it is directed for service, after the time for service has been extended, such summons may not be used as a basis for the issuance of an alias process or the extension of time for service. Deaton v. Thomas, 262 N.C. 565, 138 S.E.2d 201 (1964).

Effect of Substituting Counties in Original Summons. — Substituting "Mecklenburg" for "Cleveland" County in the original summons and sending such summons to the sheriff of Mecklenburg County works a discontinuance of the action commenced by issuance of summons to Cleveland County. Morton v. Blue Ridge Ins. Co., 250 N.C. 722, 110 S.E.2d 330 (1959).

Signature of Sheriff.—Where process issued to the sheriff of one county is returned and the clerk strikes through the name of the county and inserts the name of a second county, so that the process is directed to the sheriff of the second county, the fact that the sheriff of the second county signs it at the place for the signature of the sheriff of the first county is immaterial, it appearing from the affidavit of the clerk that the summons was served by the sheriff of the second county, and further, the court will take judicial notice of the person who is the sheriff of the county. Morton v. Blue Ridge Ins. Co., 250 N.C. 722, 110 S.E.2d 330 (1959).

Want of Signature of Clerk Does Not Render Summons Fatally Defective.—The want of a signature of the clerk on a summons otherwise complete with seal does not render the summons fatally defective and ineffectual to confer jurisdiction, but merely irregular and subject to amendment; for any defect or omission of a formal character which would be waived or remedied by a general appearance or an answer upon the merits, may be treated as a matter which can be remedied by amendment. The imprint of the seal furnishes internal evidence of the official origin of the summons. Beck v Voncannon, 237 N.C. 707, 75 S.E.2d 895 (1953).

Summons Signed by Deputy.—Where a summons, otherwise complete and regular, was signed by the deputy clerk and thereupon served, the summons was not void. The failure of the deputy to sign the name of his principal was a nonjurisdictional irregularity. Beck v. Voncannon, 237 N.C. 707, 75 S.E.2d 895 (1953).

Summons a Nullity if Not Served within Prescribed Time.—The service of summons after the date fixed for its return, there being no endorsement by the clerk extending the time for service, is a nullity. Webb v. Seaboard Air Line R.R., 268 N.C. 552, 151 S.E.2d 19 (1966).

Prerequisites to Extension of Time for Service.—In order for a plaintiff to be entitled to the procurement of an extension of time to serve summons, it is contemplated by the statutes and decisions of this State that the summons, as originally issued or extended by order of the clerk, must be served by the sheriff to whom it is addressed for service within the time provided therein, and if not served within that time, such summons must be returned by the officer holding the same for service to the clerk of the county issuing the summons, with notation thereon of its nonservice and the reasons therefor as to any defendant not served. Deaton v. Thomas, 262 N.C. 565, 138 S.E.2d 201 (1964).

Summons Never Delivered to Officer Cannot Be Used as Basis for Extension of Time.—Where a summons is issued by a clerk of the superior court and such summons is never delivered to the officer to whom it is directed for service, after the time for service has been extended, such summons may not be used as a basis for the issuance of an alias process or the extension of time for service. Deaton v. Thomas, 262 N.C. 565, 138 S.E.2d 201 (1964).

Summons Served Late without Extension Is Nullity.—The service of summons after date fixed for its return, there being no endorsement by the clerk extending the time for service, is a nullity. Webb v. Seaboard Air Line R.R., 268 N.C. 552, 151 S.E.2d 19 (1966).

Service by Rural Policeman for Sheriff.—See Griffin v. Barnes, 242 N.C. 306, 87 S.E.2d 560 (1955).

Sufficiency of Service.—Where an order for service of process on a nonresident motorist was directed to the sheriff of one county and process was served by the sheriff of another county, service was insufficient. Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966).

Where, apparently through inadvertence, the order for service of process upon a nonresident motorist was directed to the sheriff of one county, but was forwarded by the plaintiff's attorneys to the sheriff of another county and by him served upon the Commissioner of Motor Vehicles, service was insufficient, notwithstanding that notice of service of process upon the Commissioner and a copy thereof did reach the defendant by registered mail. Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966).

Service Not Waived by Appearance under Order for Pretrial Examination.—The appearance of a party under order of court for the purpose of a pretrial examination does not amount to a waiver of service of summons, since the appearance is not voluntary. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

Motion to Set Aside Default Judgment for Want of Service.—A meritorious defense is not essential or relevant on a motion to set aside a default judgment for want of jurisdiction by reason of want of service of summons. Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N.C. 791, 127 S.E.2d 573 (1962).

Where process issued to the sheriff of one county is returned without any notation thereon but with an accompanying letter stating that the defendant named is in another county, the act of the clerk in marking through the name of the first county and writing above it the name of the second county, so that the process is directed to the sheriff of the second county, amounts to the issuance of new process and institutes a new action as of the date of the later issuance, and service by the sheriff of the second county meets all the requirements of the law. Morton v. Blue Ridge Ins. Co., 250 N.C. 722, 110 S.E.2d 330 (1959).

An alias summons issues only when the original summons has not been served upon a party defendant named therein. Cherry v. Woolard, 244 N.C. 603, 94 S.E.2d 562 (1956).

Issuance of Alias and Pluries Summons Keeps Cause of Action Alive.—In a civil action or special proceeding where a defendant has not been served with the original summons, the proper issuance of alias and pluries summons keeps the cause of action alive, and prevents its discontinuance. Sizemore v Maroney, 263 N.C. 14, 138 S.E.2d 803 (1964).

Where the original summons has lost

its vitality, to prevent a discontinuance of the action (and thereby toll the statute of limitations), plaintiff must cause alias summons to be issued and served. Williams v. Bray, 273 N.C. 198, 159 S.E.2d 556 (1968).

The duty is placed upon plaintiff to sue out the alias or pluries summons, if preceding writs have proved ineffectual, in order to avoid a discontinuance of the action. Williams v. Bray, 273 N.C. 198, 159 S.E.2d 556 (1968).

Plaintiff May Apply Orally or in Writing to Clerk of Superior Court.—In order for the plaintiff to cause an alias or pluries summons to issue, he may apply orally or in writing to the clerk of superior court, and no order of court is necessary to authorize the clerk to issue such summons. Williams v. Bray, 273 N.C. 198, 159 S.E.2d 556 (1968).

Sufficiency of Alias or Pluries Summons.—Where there is nothing upon a paper writing to indicate that it is an alias or pluries summons or that it related to any original process, such paper writing, even though sufficient to constitute an original summons, cannot constitute an alias or pluries summons. Webb v. Seaboard Air Line R.R., 268 N.C. 552, 151 S.E.2d 19 (1966).

Rule 5. Service and filing of pleadings and other papers.

(a) *Service—when required.*—Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(b) *Service—how made.*—A pleading setting forth a counterclaim or crossclaim shall be filed with the court and a copy thereof shall be served on the party against whom it is asserted or on his attorney of record in the manner provided for service of process in Rule 4. Written return shall be made by the officer making or attempting to make service thereof, but failure to make return shall not invalidate the service. With respect to all other pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided for service and return of process in Rule 4 and may be made upon either the party or, unless service upon the party himself is ordered by the court, upon his attorney of record. With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by filing it with the clerk of court. Delivery of a copy within this rule means handing it to the attorney or to the party; or leaving it at the attorney's office with a partner or employee. Service by mail shall be complete upon deposit of the pleading or paper enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office Department.

(c) *Service—numerous defendants.*—In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any crossclaim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) *Filing.*—All pleadings subsequent to the complaint shall be filed with the court. All other papers required to be served upon a party shall be filed with the court either before service or within five days thereafter. With respect to all pleadings and other papers as to which service and return has not been made in the manner provided in Rule 4, proof of service shall be made by filing with the court a certificate either by the attorney or the party that the paper was served in the manner prescribed by this rule, or a certificate of acceptance of service by the attorney or the party to be served. Such certificate shall show the date and method of service or the date of acceptance of service.

(e) *Filing with the court defined.*—The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk. (1967, c. 954, s. 1.)

Comment.—*Section (a).* This section is based upon the federal rule and incorporates part of the West Virginia rule.

Former § 1-125 required that a copy of the answer be mailed to the plaintiff or his attorney of record by the clerk and prohibited the clerk from allowing the answer to be filed without a copy for that purpose. Former § 1-140 stated that if no copy of an answer containing a counterclaim was served upon the plaintiff or his attorney, the allegations in the counterclaim should be denied as a matter of law. Other statutes dealing with serving of notice included: Former § 1-578, providing that no motion might be heard and no orders in the cause might be made outside the county where the action was pending unless notice of motion was served on the opposing party in accordance with the provisions of § 1-581; former § 1-568.13, service of order upon person to be examined under adverse party examination statutes; former § 1-568.14, notice to all other parties; former § 8-89, inspection of writings; former § 8-90, production of documents; former §§ 8-71 and 72, depositions; former § 1-153, motion to strike; and § 40-17, notice to parties in eminent domain proceedings.

This section is intended to include all such motions and orders. The phrase "and similar paper" indicates that the enumeration of papers is not exhaustive.

Section (b).—This section is based upon the federal rule but does not track the exact language of the federal rule. The section preserves the requirement of former § 1-140 that a counterclaim or crossclaim be served on the party against whom it is asserted or on his attorney of record.

Former §§ 1-585, 586, and 587 prescribed the form of notices and method of service, which was similar to this section. These provisions permit service upon a party or his attorney unless otherwise provided.

No statutory provision providing heretofore for notice by mail has been found, but such notice by mail was upheld by the court in a case where defendant filed a written motion to strike portions of the complaint and the court found that copies of the motion had been mailed to and received by plaintiff's attorneys. The court said in such circumstances plaintiff was not entitled to have notice of the motion to strike served on her by an officer. Heffner v. Jefferson Std. Life Ins. Co., 214 N.C. 359, 199 S.E. 293 (1938).

Section (c). — This section tracks the language of the federal rule. It should be pointed out that the rule is permissive and applies only when the court makes an order under the rule. If such an order is made, a copy of the order must be served upon all parties. If such an order is made, each defendant prepares his answer to the complaint in which he may state his defenses to the complaint, counterclaims against the plaintiff, and cross actions against any or all of the defendants. Each defendant must serve his answer upon the plaintiff within the time prescribed by Rule 12 (a) and file it with the court. The plaintiff is not required to serve and file replies to counterclaims stated in any of the answers of the defendants, and no defendant need serve and file an answer to a crossclaim asserted against him in any of the answers of the defendants. Any counterclaim, crossclaim, or matter constituting an avoidance or affirmative defense contained in any of the answers of the defendants shall be deemed denied. It should be noted that this section dispenses with service of replies to counterclaims and answers to crossclaims only. Other pleadings and all motions must be served as in other cases.

This section also provides that "the filing of any such pleading and service thereof on the plaintiff constitutes due notice of it to the parties." In all cases where an order is entered under the provisions of this section the defendant or his attorney would be required to examine the court file to determine if any crossclaim had been filed against him.

Former § 1-140 provided that if an answer containing a counterclaim was not served on the plaintiff or his attorney, the counterclaim should be deemed denied. The second paragraph of the same statute provided that if a defendant asserted a crossclaim against a codefendant, no judgment by default might be entered against such codefendant unless he had been served with a notice together with a copy of such crossclaim. Thus, the statute did not require that a counterclaim or crossclaim be "served"; it merely denied certain kinds of relief (default judgment) if such was not served.

Default provisions such as Rule 55 would obviously be inoperative if the judge made an order under this section.

Section (d).—Although this section incorporates most of the federal rule, federal Rule 5 (d) was deemed insufficient for North Carolina practice. Consequently, this section is more detailed than the federal rule. The section also incorporates part of the West Virginia rule but does not track the language of that rule. There is no provision in the federal rule with respect to acceptance of service or of a certificate indicating the method of service. It is believed that this section is more in line with North Carolina practice with respect to service or acceptance of service of summons and other process.

This section will not affect the provisions of certain other rules with respect to filing of papers, such as Rule 3, which requires the complaint to be filed before service.

In substance, this section requires the filing with the court of all papers which are required to be served. There are also papers which are not required to be served, which must also be filed, such as motions which may be heard ex parte. Good practice would indicate that all papers relating to the action should be filed with the court whether required by these rules or not.

Section (e). — This section tracks the federal rule. It reflects prior North Carolina practice.

Rule 6. Time.

(a) *Computation.*—In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, including rules, orders or statutes respecting publication of notices, the day of the act, event, default or publication after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) *Enlargement.*—When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order. Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect. Notwithstanding any other provisions of this rule, the parties may enter into binding stipulations without approval of the court enlarging the time, not to exceed in the aggregate 30 days, within which an act is required or allowed to be done under these rules, provided, however, that neither the court nor the parties may extend the time for taking any action under Rules 50 (b), 52, 59 (b), (d), (e), 60 (b), except to the extent and under the conditions stated in them.

(c) *Unaffected by expiration of session.*—The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a session of court. The continued existence or expiration of a session of court in no way affects the power of a court to do any act or take any proceeding, but no issue of fact shall be submitted to a jury out of session.

(d) *For motions, affidavits.*—A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and except as otherwise provided in Rule 59 (c), opposing affidavits may unless the court permits them to be served at some other time be served not later than one day before the hearing.

(e) *Additional time after service by mail.*—Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period. (1967, c. 954, s. 1.)

Comment.—*Section (a).*—The basic rule of excluding the first and including the last day is presently embodied in § 1-593 as to the time within which an act is to be done, and in § 1-594 as to publication of notices. Section 1-593 excludes the last day if it is a Sunday or a legal holiday. The federal rule and this section also exclude Saturdays. This section also conforms publication period time requirements to other time computations.

One other significant change is wrought by adoption of this provision. Formerly, intermediate Saturdays, Sundays, and holidays were included in computing the time, no matter how short the period was. The federal rule makes allowance for the shorter periods of time by providing that if the period is seven days or less, intermediate Saturdays, Sundays or holidays shall not be included.

Section (b).—This section, based upon the federal rule, is more detailed than former statutory provisions. However, there is no basic change in procedure. Former § 1-125 permitted the clerk to extend the time for filing answer or demurrer for a period of time not exceeding 20 days. Former § 1-152 permitted the judge in his discretion to enlarge the time for the doing of any act. Former § 1-220 permitted the clerk or the judge to relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and to supply an omission in any proceeding.

Section (c).—Self-explanatory.

Section (d).—Former § 1-581 provided for 10 days' notice of motion. Thus, adoption of this section results in halving the normal period of notice.

Section (e).—There is no present statutory equivalent to this section. As to service of notice, the statutes do not contemplate service by mail. However, service of notice on plaintiff's attorneys by mail was upheld in Heffner v. Jefferson Std. Life Ins. Co., 214 N.C. 359, 199 S.E. 293 (1938). There are other instances in which service by mail is possible.

Editor's Note.—The cases cited in this note were decided under former § 1-152.

Inherent Power to Extend Time.—The superior court possesses an inherent discretionary power to amend pleadings or allow them to be filed at any time, unless prohibited by some statute, or unless vested rights are interfered with. Gilchrist v. Kitchen, 86 N.C. 20 (1882); Rich v. Norfolk S. Ry., 244 N.C. 175, 92 S.E.2d 768 (1956).

A judge of the superior court in this State has inherent power in his discretion and in furtherance of justice to extend the time for filing a complaint, and he is also vested with such authority by statute. Deanes v. Clark, 261 N.C. 467, 135 S.E.2d 6 (1964).

The right to amend pleadings in a case and allow answers or other pleadings to be filed at any time is an inherent and statutory power of the superior courts which they may exercise at their discretion, unless prohibited by some statutory enactment or unless vested rights are interfered with. State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

This section has been held applicable to complaints. Deanes v. Clark, 261 N.C. 467, 135 S.E.2d 6 (1964).

Where an amended complaint is filed after expiration of the time allowed in the order permitting the filing of the amendment, the trial court has the discretionary power to enter an order extending the time for the filing of the amendment to the date of the hearing and overrule defendant's motion to strike on the ground that the amendment was filed after the expiration of the time allowed. Alexander v. Brown, 236 N.C. 212, 72 S.E.2d 522 (1952).

Defendants were not entitled to dismissal as a matter of right for plaintiff's failure to file complaint in due time, since this section authorizes the judge, in his discretion, to enlarge time for pleading. Early v. Eley, 243 N.C. 695, 91 S.E.2d 919 (1956).

Enlarging Time for Filing Answer.—The judge of the superior court where a civil action has been brought has the discretionary power to enlarge the time in which an answer may be filed to the complaint beyond that limited before the clerk, upon such terms as may be just, by an order to that effect. Aldridge v. Greensboro Fire Ins. Co., 194 N.C. 683, 140 S.E. 706 (1927); Harmon v. Harmon, 245 N.C. 83, 95 S.E.2d 355 (1956).

When the complaint states a cause of action, the court, in the exercise of its discretion, may extend defendant's time to plead. Walker v. Nicholson, 257 N.C. 744, 127 S.E.2d 564 (1962).

Section 136-107, limiting the time for the filing of answer in condemnation proceedings instituted by the Highway Commission, must be construed as an exception to the general power of the court to extend the time for the filing of pleadings, so that the court has no discretionary power to allow the filing of an answer after the time limited in the condemnation statute. State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

Motion to Strike.—When a motion to strike is not made in apt time, the court has discretionary power to allow or deny such motion, and its ruling will not be disturbed on appeal in the absence of an abuse of discretion. McDaniel v. Fordham, 264 N.C. 62, 140 S.E.2d 736 (1965).

Section 136-107 Prohibits Exercise of Discretion in Condemnation Cases.—Section 136-107 expresses a definite, sensible, and mandatory meaning concerning procedure in condemnation proceedings under chapter 136, so as to prohibit the exercise of the statutory or inherent power by the superior court to allow extension of time to answer after time allowed by § 136-107 has expired. State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

Review of Discretion.—It is generally held that whenever the judge is vested with a discretion, his doing or refusal to do the act in question is not reviewable upon appeal. Beck v. Bellamy, 93 N.C. 129 (1885); Best v. British & Am. Mtg. Co., 131 N.C. 70, 42 S.E. 456 (1902); Wilmington v. McDonald, 133 N.C. 548, 45 S.E. 864 (1903); United Am. Free-will Baptist Church, Northeast Conference v United Am. Free-will Baptist Church, Northwest Conference, 158 N.C. 564, 74 S.E. 14 (1912); Early v. Eley, 243 N.C. 695, 91 S.E.2d 919 (1956); Harmon v. Harmon, 245 N.C. 83, 95 S.E.2d 355 (1956).

If the exercise of a discretionary power of the superior court is refused upon the ground that it has no power to grant a motion addressed to its discretion, the ruling of the court is reviewable. State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

A judgment or order rendered by a judge of the superior court in the exercise of a discretionary power is not subjected to review by appeal to the Supreme Court in any event, unless there has been an abuse of discretion on his part. State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

This discretion, however, is not an arbitrary but a legal discretion. Hudgins v. White, 65 N.C. 393 (1871).

ARTICLE 3.

Pleadings and Motions.

Rule 7. Pleadings allowed; form of motions.

(a) *Pleadings.*—There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a crossclaim, if the answer contains a crossclaim; a third-party complaint if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed except that the court may order a reply to an answer or a third-party answer.

(b) *Motions and other papers.*—

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) A motion to transfer under G.S. 7A-258 shall comply with the directives therein specified but the relief thereby obtainable may also be sought in a responsive pleading pursuant to Rule 12 (b).

(c) *Demurrers, pleas, etc., abolished.*—Demurrers, pleas, and exceptions for insufficiency shall not be used.

(d) *Pleadings not read to jury.*—Unless otherwise ordered by the judge, pleadings shall not be read to the jury. (1967, c. 954, s. 1.)

Comment.—*Section (a).* — This section defines the total permissible range of pleadings, following long established code procedure by making the reply the terminal permissible pleading in the traditional exchange between plaintiff and defendant. Furthermore, this section makes specific that which has been evolved without literal sanction under the code, that an answer is to be filed to a crossclaim and that where additional defendants are summoned, third party complaint and answer are to be filed. The only time reply is actually required, aside from when ordered by the court, is to a counterclaim actually so denominated. This is an improvement over code procedure, which requires a reply to any counterclaim at peril of admitting its allegations, thereby putting an unjustifiable burden on the plaintiff to ascertain at his peril whether answers containing affirmative defenses may be construed to involve counterclaims. Whether or not a reply is necessary is presently extremely difficult to determine in other contexts. Compare, e.g. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966), and former § 1-159. Finally, following code practice, authority is given the courts to order replies to non-counterclaiming answers and third party answers, thus rounding out the total list of permissible pleadings under all circumstances.

Section (b) (1). — This section makes more explicit as a matter of literal statement the motion practice actually followed under present code practice. The specification that written motions shall state their grounds and the relief sought is a helpful directive. And the provision for combining the motion with the notice thereof actually gives literal sanction to a procedure of convenience frequently indulged in State court practice without such direct authorization.

Section (c). — This section rounds out the exclusive listing of pleadings and motions allowable under this approach, by making explicit what a long tradition might have resisted, that those other traditional pre-trial stage procedural devices, the demurrer and the special pleas, are abolished from the practice. There are to be only the listed pleadings, and motions shaped functionally to accomplish various specific pretrial purposes formerly served by motions, demurrers and pleas. The abolition of these devices by name does not, of course, automatically do away with the possibility that the functions served by these shall continue to be served. This section must be read in the light of Rule 12, wherein the new procedure by which these functions are served is spelled out.

Section (d).—The purpose of this section is to end the practice of reading pleadings to the jury. The Commission contemplated that a brief opening statement would generally be substituted.

Editor's Note.—For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1. For article on pleadings and motions, see 5 Wake Forest Intra. L. Rev. 70.

Quoted in Jackson v. Jones, 1 N.C. App. 71, 159 S.E.2d 580 (1968).

Rule 8. General rules of pleadings.

(a) *Claims for relief.*—A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, shall contain

(1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and

(2) A demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) *Defenses; form of denials.*—A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part of or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) *Affirmative defenses.*—In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in actions for defamation, usury, waiver, and any other matter constituting an avoidance or affirmative defense. Such pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) *Effect of failure to deny.*—Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) *Pleading to be concise and direct; consistency.*—

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insuffcient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) *Construction of pleadings.*—All pleadings shall be so construed as to do substantial justice. (1967, c. 954, s. 1.)

Comment.—*Section (a).*—In prescribing what a complaint is to contain, it will be observed that while the Commission abandoned the code formulation of "a plain and concise statement of the facts constituting a cause of action," it did not adopt without change the federal rules formula, "a short and plain statement of the claim showing that the pleader is entitled to relief." The statement must be "sufficiently particular to give the court and the parties notice of the transactions or occurrences, intended to be proved. . . ."

The Commission's objective may be summarized as follows: 1. By omitting any requirement in terms that a complaint state "facts," the Commission sought to put behind it the sterile dispute as to whether an allegation states evidentiary or ultimate facts or conclusions of law. Of course, in order to show that he is entitled to relief, a pleader will be compelled to be factual, but the new formulation saved him from foundering on the ancient distinctions.

2. By omitting any reference to "cause of action," and directing attention to the notice-giving functions served by the complaint, the Commission sought a new start on the problem of how much specificity is desirable in a complaint. It can fairly be argued, of course, that when the Commission substitued "claim" for "cause of action" that it was merely exchanging one conundrum for another. But changing the formulation does have the advantage of enabling the courts to approach the problem of specificity unembarrassed by prior decisions and with an eye to the functions that pleading can properly serve. Moreover, the new approach can take into account other procedures provided by these rules—the pre-trial conference, the broadened discovery, the summary judgment.

3. By specifically requiring a degree of

particularity the Commission sought to put at rest any notion that the mere assertion of a grievance will be sufficient under these rules. In this connection, the forms provided in Rule 84 should be examined. The Commission's prescription suggests that not only is it permissible under these rules for a pleader to so plead as to obviate the need for a pre-trial conference or resort to the discovery procedures but that it will frequently be his duty to do so.

Section (b). — This section sets forth the basic directive for defensive pleading. It follows the basic code pattern of requiring either denials or admissions of all specific averments of the claimant for affirmative relief, or the pleading of affirmative defenses in avoidance. It is interesting to reflect that here, too, is a plain indication that Rule 8 (a) contemplates factual pleading, else the directive to admit or deny averments is meaningless. Sanction is given as in existing State practice to obtain the effect of a denial by stating lack of sufficient knowledge or information to form a belief. The traditional prohibition against negative pregnant pleading is stated in terms of fairly meeting the substance of averments denied.

The fairly detailed specification of the different forms that partial denials and admissions may take is a helpful one and does not appear in the code. An innovation from the standpoint of existing State practice is involved in the allowance of a true general denial, or a qualified general denial not directed specifically to each separate paragraph, which is the largest unit that may be generally denied under judicial interpretation of the code.

Section (c) contains a helpful specific listing of numerous traditional defenses which must be specially pleaded. This enumeration is beneficial in avoiding questions as to whether this or that defense is an "affirmative defense" required to be pleaded to allow evidence in its proof. At least one change in existing law is involved in the inclusion of the defense of statute of frauds in this listing. Added to the federal listing are truth in defamation actions, and usury, to reflect exisitng State practice.

Section (d) states existing State practice.

Section (e) (1) contains a general homily eschewing the old technical forms of pleading and admonishing directness rather than the pomposity which frequently creeps into common law and code pleading.

Section (e) (2) directly sanctions alternative and hypothetical pleadings, which are not literally sanctioned under the code, but generally permitted within limits. More significantly this rule directly authorizes the pleading of inconsistent claims as well as defenses. While inconsistent defenses are now permissible under the code, inconsistent affirmative claims of some types have been held to require election when their underlying legal theories (as opposed to factual theories) were substantively inconsistent.

Section (f) states a homily similarly expressed under the code in former § 1-151.

Editor's Note.—The cases cited in this note were decided under former §§ 1-151 and 1-159.

In Favor of Pleader.—Pleading must be liberally construed, and every reasonable intendment and presumption must be in favor of the pleader. A pleading must be fatally defective before it will be rejected as insufficient. Corbett v. Hilton Lumber Co., 223 N.C. 704, 28 S.E. 250 (1943). See Sandlin v. Yancey, 224 N.C. 519, 31 S.E.2d 532 (1944); Ferrell v. Worthington, 226 N.C. 609, 39 S.E.2d 812 (1946); Winston v. Williams & McKeithan Lumber Co., 227 N.C. 339, 42 S.E.2d 218 (1947); McCampbell v. Valdese Bldg. & Loan Ass'n, 231 N.C. 647, 58 S.E.2d 617 (1950). Peoples Oil Co. v. Richardson, 271 N.C. 696, 157 S.E.2d 369 (1967).

The court is required on a demurrer to construe the complaint liberally with a view to substantial justice between the parties, and every reasonable intendment is to be made in favor of the pleader. Setser v. Cepco Dev. Corp., 3 N.C. App. 163, 164 S.E.2d 407 (1968).

The allegations of the complaint are to be liberally construed so as to give the plaintiff the benefit of every reasonable intendment in his favor. Clemmons v. Life Ins. Co., 274 N.C. 416, 163 S.E.2d 761 (1968).

With View to Substantial Justice between Parties.—This section requires the court to construe liberally a pleading challenged by a demurrer with a view to substantial justice between the parties. Stamey v. Rutherfordton Elec. Membership Corp., 247 N.C. 640, 101 S.E.2d 814 (1958); Clemmons v. Life Ins. Co., 1 N.C. App. 215, 161 S.E.2d 55 (1968).

This section requires that the allegations of a pleading shall be liberally construed for the purpose of determining their effect and with a view to substantial justice between the parties. Edwards v. Edwards, 261 N.C. 445, 135 S.E.2d 18 (1964); Powell v. Powell, 271 N.C. 520, 156 S.E.2d 691 (1967).

Pleadings challenged by a demurrer are to be construed liberally with a view to substantial justice between the parties. Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968).

A motion for judgment on the pleadings is not favored by the courts; pleadings alleged to state no cause of action or defense will be liberally construed in favor of the pleader. Edwards v. Edwards, 261 N.C. 445, 135 S.E.2d 18 (1964); Powell v. Powell, 271 N.C. 420, 156 S.E.2d 691 (1967).

Statement of Cause of Action. — If the complaint merely alleges conclusions, it is demurrable. On the other hand, if in any portion of it or to any extent it presents facts sufficient to constitute a clause of action the pleading will stand. Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968).

Extent of Liberal Construction Rule.— While this section requires the Supreme Court to construe liberally the allegations of a challenged pleading, the Supreme Court is not permitted to read into it facts which it does not contain. Lane v. Griswold, 273 N.C 1., 159 S.E.2d 338 (1968).

Liberal construction does not mean that the court is to read into the complaint allegations which it does not contain. Clemmons v. Life Ins. Co., 274 N.C. 416, 163 S.E.2d 761 (1968).

A complaint must be fatally defective before it will be rejected as insufficient. Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968).

A demurrer will not be sustained unless the complaint is fatally and wholly defective. Clemmons v. Life Ins. Co., 1 N.C. App. 215, 161 S.E.2d 55 (1968).

It is proper to strike repetitious allegations from the pleadings. Girard Trust Bank v. Easton, 3 N.C. App. 414, 165 S.E.2d 252 (1969).

New matter in the answer not relating to a counterclaim is deemed denied without a reply. Sullivan v. Johnson, 3 N.C. App. 581, 165 S.E.2d 507 (1969).

Rule 9. Pleading special matters.

(a) *Capacity.*—Any party not a natural person shall make an affirmative averment showing its legal existence and capacity to sue. Any party suing in any representative capacity shall make an affirmative averment showing his capacity and authority to sue. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) *Fraud, duress, mistake, condition of the mind.*—In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) *Conditions precedent.*—In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) *Official document or act.*—In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) *Judgment.*—In pleading a judgment, decision or ruling of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment, decision or ruling without setting forth matter showing jurisdiction to render it.

(f) *Time and place.*—For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) *Special damage.*—When items of special damage are claimed each shall be averred.

(h) *Private statutes.*—In pleading a private statute or right derived therefrom it is sufficient to refer to the statute by its title or the day of its ratification, and the court shall thereupon take judicial notice of it.

(i) *Libel and slander.*—

(1) In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the claim for relief arose, but it is sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation is controverted, the plaintiff is bound to establish on trial that it was so published or spoken.

(2) The defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances. (1967, c. 954, s. 1.)

Comment.—This rule is designed to lay down some special rules for pleading in typically recurring contexts which have traditionally caused trouble when no codified directive existed.

Section (a).—This section deals with the problem of putting in issue the legal existence, the capacity or the authority of parties. The rule as presented here requires that parties plaintiff who are not natural persons shall affirmatively aver their legal existence and capacity and that parties plaintiff suing in representative capacities shall affirmatively plead to show capacity and authority. However, the further requirement is laid down that any party actually desiring to put any of these concepts in issue shall negatively aver their nonexistence and support the averment. This section departs from federal Rule 9, which has no requirement that capacity, legal existence or representative authority be affirmatively averred. The code nowhere deals specifically with the question whether capacity, etc., must be affirmatively pleaded. It did, of course, provide for demurrer to a complaint which affirmatively disclosed lack of capacity. Former § 1-127 (2). Monfils v. Hazlewood, 218 N.C. 215, 10 S.E.2d 673 (1940) (complaint in wrongful death action affirmatively showing plaintiff a foreign administratrix). Capacity and existence are customarily pleaded affirmatively in North Carolina practice in any context where they might possibly be in issue, e.g., by parties suing in representative capacities; by corporations. There is no present code requirement that their nonexistence or noncapacity be specifically averred and supported by pleading in order to put this in issue, and the rule does require this. This is an improvement, since it deprives parties of the easy ability, without real basis in fact, to put the opponent to needless proof of these matters.

Section (b).—This section codifies a rule applied without specific code directive in existing State practice. See, e.g., Calloway v. Wyatt, 246 N.C. 129, 97 S.E.2d 881 (1957).

Section (c).—This section is an approximate counterpart to former § 1-155. The rule is, however, more precise on two aspects, and thereby an improvement. First, it is made plain that the license to plead generally extends to "occurrence" as well as to "performance" of conditions precedent. Second, the rule requires that the party desiring to controvert performance or occurrence must specify and particularize rather than merely deny the general allegation.

Section (d).—This section had no counterpart in existing law, but is a helpful sanction to plead generally and in conclusory terms the official character of document issuance and particular acts—"facts" not logically subject to "ultimate fact" pleading.

Section (e).—This section is an approximate counterpart to former § 1-154, but makes precise some things not spelled out in that statute, i.e., that it relates to judgments of foreign as well as domestic courts and to the decisions of quasi-judicial tribunals as well as those of traditional courts of law and judicial officers.

Section (f). — This section varies the usual rule under the code that allegations of time and place are immaterial, but in only one narrow respect, viz., that for purposes of testing the sufficiency of a pleading, i.e., on motion to dismiss or for judgment on the pleadings, such allegations are considered material. The main purpose of this is to allow the early raising of issues as to the bar of the statute of limitations. This section would actually solidify a trend in North Carolina practice toward pre-trial resolutions of the issue, notwithstanding it may not technically be raised by an attack by demurrer on the pleading itself, but must be affirmatively pleaded by the party relying on the defense. Section 1-15. The practice has already evolved, however, of resolving the issue after answer filed, on pre-trial motion or motion for judgment on the pleading. See, e.g., Rowland v. Beauchamp, 253 N.C. 231, 116 S.E.2d 720 (1960); Gillikin v. Bell, 254 N.C. 244, 118

S.E.2d 609 (1961). This section would carry the process one step further and allow the issue to be raised prior to filing of answer by motion to dismiss. For all other purposes, however, allegations of time and place ordinarily remain immaterial, so far as limiting proof is concerned. Of course, any question of materiality is customarily avoided by the "on or about" or "at or near" type allegation.

Section (g). — This section codifies, without attempting elaboration, the rule generally stated and followed under North Carolina code practice. It attempts no specification of what amounts to "special damage" in particular context, so that developed case precedent on this would continue to apply. See, on this point, Brandis and Trotter, *Some Observations on Pleading Damages in North Carolina*, 31 N.C.L. Rev. 249 (1953).

Section (h).—This section has no counterpart in the federal rules, but is taken from former § 1-157.

Section (i).—This section has no counterpart in the federal rules, but is taken from former § 1-158.

Rule 10. Form of pleadings.

(a) *Caption; names of parties.*—Every pleading shall contain a caption setting forth the division of the court in which the action is filed, the title of the action, and a designation as in Rule 7 (a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) *Paragraphs; separate statement.*—All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) *Adoption by reference; exhibits.*—Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion in the action. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes. (1967, c. 954, s. 1.)

Comment.—*Section (a).* — This section dealing with the formal caption and designation of parties in the pleadings generally approximates the corresponding directive found in former § 1-122 (1), although the latter actually dealt literally only with the caption and party designation in the complaint. The rule literally sanctions the practice customarily followed of shortening the listing of multiple parties in all pleadings subsequent to the complaint.

Section (b).—This section deals basically with the requirement that pleadings be drafted in a format designed to promote the clear definition of fact issues—the required separate statement in numbered paragraphs of practically manageable aggregates of factual averments, each generally referable to a separate substantive concept likely to lead to one manageable issue if controverted. This is a key innovation in the code "fact-pleading" reform in reaction to the formulary pleading of common law. Thus, comparable provisions were found in former §§ 1-122 (2) (complaint) and 1-138 (answer). By carrying forward this scheme, it is made abundantly clear that these rules are designed just as are the codes to cause factual issues clearly to emerge in the unsupervised exchange of pleadings where skilled and honest pleaders are aligned in opposition. That this is the design of these rules, particularly as exemplified in Rule 10 (b), see Mr. Justice Jackson's analysis and admonition in O'Donnell v. Elgin, J. & E. Ry., 338 U.S. 384, 70 S. Ct. 200, 94 L. Ed. 187, 16 A.L.R.2d 646 (1949) ("We no longer insist upon technical rules of pleading, but it will ever be difficult in a jury trial to segregate issues which counsel do not separate in their pleading, preparation or thinking"). It can be stated quite confidently that this rule contemplates a continuation of the issue-defining fact pleading approach of the code.

Section (c). — This section's first sentence involves a change from present practice which is controlled by a rule of the Supreme Court and does not permit adoption of portions of pleadings by reference into other parts of the cause or other pleadings. Of course, this presents a critical policy question of the propriety of adopting statutes in direct conflict with existing court rules. However, the practice sanctioned in this rule is believed an improvement, all things considered. The second sentence, directly sanctioning the incorporation of attached exhibits involves no change in procedure. The phrase "for all purposes" is apt to avoid the type of decision which quibbles over whether mere attachment of an exhibit without express works purporting to incorporate particular aspects as direct allegations does have this effect.

Rule 11. Signing and verification of pleadings.

(a) *Signing by attorney.*—Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by these rules or by statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served.

(b) *Verification of pleadings by a party.*—In any case in which verification of a pleading shall be required by these rules or by statute, it shall state in substance that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true. Such verification shall be by affidavit of the party, or if there are several parties united in interest and pleading together, by at least one of such parties acquainted with the facts and capable of making the affidavit. Such affidavit may be made by the agent or attorney of a party in the cases and in the manner provided in section (c) of this rule.

(c) *Verification of pleadings by an agent or attorney.*—Such verification may be made by the agent or attorney of a party for whom the pleading is filed, if the action or defense is founded upon a written instrument for the payment of money only and the instrument or a true copy thereof is in the possession of the agent or attorney, or if all the material allegations of the pleadings are within the personal knowledge of the agent or attorney. When the pleading is verified by such agent or attorney, he shall set forth in the affidavit:

(1) That the action or defense is founded upon a written instrument for the payment of money only and the instrument or a true copy thereof is in his possession, or

(2) a. That all the material allegations of the pleadings are true to his personal knowledge and
  b. The reasons why the affidavit is not made by the party.

(d) *Verification by corporation or the State.*—When a corporation is a party the verification may be made by any officer, or managing or local agent thereof upon whom summons might be served; and when the State or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts. (1967, c. 954, s. 1.)

Comment.—This rule is in form an amalgamation of federal Rule 11 and basic North Carolina statutes concerned with signing and verification of pleadings. The provision common to both, that every pleading must be signed either by a party or his attorney of record, is retained. The requirement that every pleading subsequent to a verified pleading must be verified is abandoned, and the only time any pleading must be verified is when some statute specifically requires it, as in actions for divorce, (§ 50-8). As an alternative to the verification control on truth, the federal approach of constituting an attorney's signature to any pleading a certificate of good faith in its preparation is adopted. However, the severe explicit federal rule sanction of disciplinary action against an attorney violating this rule is dropped, retaining only the sanction of striking as sham.

Sections (b), (c), and (d) are not found in the corresponding federal rule, but are lifted as substantial counterparts from former §§ 1-145, 1-146, and 1-147.

Editor's Note.—The cases cited in this note were decided under former §§ 1-144, 1-145 and 1-146.

For case law survey as to verification of pleading, see 44 N.C.L. Rev. 897 (1966).

The object of the verification is that if the defendant does not deny the allegations, the cause shall stand as if the jury had been empaneled, and the allegations put in proof without denial, the purpose being to avoid the delay of trial upon uncontroverted points. Griffin v. Asheville Light Co., 111 N.C. 434, 16 S.E. 423 (1892); Rich v. Norfolk S. Ry., 244 N.C. 175, 92 S.E.2d 768 (1956).

The requirement as to verification may be waived, except in those cases where the form and substance of the verification is made an essential part of the pleading. Sisk v. Perkins, 264 N.C. 43, 140 S.E.2d 753 (1965).

Whether plaintiff verifies his complaint is optional with him unless some statute requires verification as a condition to the maintenance of the action. Levy v. Meir, 248 N.C. 328, 103 S.E.2d 288 (1958).

Effect of Attempted Verification. — Where plaintiff can maintain his action without verifying the complaint, an attempted verification, which is a nullity, cannot defeat that right. Levy v. Meir, 248 N.C. 328, 103 S.E.2d 288 (1958).

A motion is not a pleading. Williams v. Denning, 260 N.C. 539, 133 S.E.2d 150 (1963).

Judgment by default may not be entered pending the hearing of a motion to strike, on the ground that the motion was not verified, since a motion is not a pleading. Williams v. Denning, 260 N.C. 539, 133 S.E.2d 150 (1963).

Affiant is not required to subscribe the affidavit. State v. Higgins, 266 N.C. 589, 146 S.E.2d 681 (1966).

It is sufficient if the oath is administered by one authorized to administer oaths. State v. Higgins, 266 N.C. 589, 146 S.E.2d 681 (1966).

Verification by Corporate Defendant Only.—The verification by the vice-president and secretary of the corporate defendant, unchallenged as a proper verification as to the corporate defendant, was not verification by or in behalf of the individual defendants. Rich v. Norfolk S. Ry., 244 N.C. 175, 92 S.E.2d 768 (1956).

Where the plaintiff's verification does not meet requirements, defendant is not required to verify his answer. Levy v. Meir, 248 N.C. 328, 103 S.E.2d 288 (1958).

Rule 12. Defenses and objections — when and how presented — by pleading or motion—motion for judgment on pleading.

(a) (1) When Presented.—A defendant shall serve his answer within 30 days after service of the summons and complaint upon him. A party served with a pleading stating a crossclaim against him shall serve an answer thereto within 30 days after service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 30 days after service of the answer or, if a reply is ordered by the court, within 30 days after service of the order, unless the order otherwise directs. Service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

a. If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 20 days after notice of the court's action;

b. If the court grants a motion for a more definite statement, the responsive pleading shall be served within 20 days after service of the more definite statement.

(2) Cases Removed to United States District Court.—Upon the filing in a district court of the United States of a petition for the removal of a civil action or proceeding from a court in this State and the filing of a copy of the petition in the State court, the State court shall proceed no further therein unless and until the case is remanded. If it shall be finally determined in the United States courts that the action or proceeding was not removable or was improperly removed, or for other reason should be remanded, and a final order is entered remanding the action or proceeding to the State court, the defendant or defendants, or any other party who would have been permitted or required

to file a pleading had the proceedings to remove not been instituted, shall have 30 days after the filing in such State court of a certified copy of the order of remand to file motions and to answer or otherwise plead.

(b) *How presented.*—Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defense may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter,
(2) Lack of jurisdiction over the person,
(3) Improper venue or division,
(4) Insufficiency of process,
(5) Insufficiency of service of process,
(6) Failure to state a claim upon which relief can be granted,
(7) Failure to join a necessary party.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The consequences of failure to make such a motion shall be as provided in sections (g) and (h). No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense, numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) *Motion for judgment on the pleadings.*—After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) *Preliminary hearings.*—The defenses specifically enumerated (1) through (7) in section (b) of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings mentioned in section (c) of this rule shall be heard and determined before trial on application of any party, unless the judge orders that the hearing and determination thereof be deferred until the trial.

(e) *Motion for more definite statement.*—If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the judge is not obeyed within 20 days after notice of the order or within such other time as the judge may fix, the judge may strike the pleading to which the motion was directed or make such orders as he deems just.

(f) *Motion to strike.*—Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 30 days after the service of the pleading upon him or upon the judge's own initiative at any time, the judge may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter.

(g) *Consolidation of defenses in motion.*—A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in section (h) (2) hereof on any of the grounds there stated.

(h) *Waiver or preservation of certain defenses.*—

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (i) if omitted from a motion in the circumstances described in section (g), or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15 (a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a necessary party, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7 (a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. (1967, c. 954, s. 1.)

Comment.—This rule deals comprehensively with the whole mechanism, including timetables, for raising all the various defenses and objections traditionally available to defensively aligned parties at some pretrial stage, including those based merely on objections to form of pleadings, those traditionally characterized as dilatory defenses, and those based upon defenses on the merits.

Section (a) is a straightforward timetable for the filing of the traditional defensive pleadings, the answer, and the reply. The 30-day period rather than the federal rule 20-day period is adopted. All other considerations of timeliness in raising the various possible objections and defenses by other devices are related to the times for filing these responsive pleadings.

The remaining sections deal in closely interrelated fashion with the whole problem of an orderly staging of the various traditional objections and defenses, worked out to guard against dilatoriness and to encourage economy of effort and early potential raising and determination of defenses likely to be decisive, either as to the abatement of the particular action, or on the merits. The key conceptions, involving some fairly drastic changes from the code practice, are these: (1) Only two kinds of procedural devices—the traditional defensive pleadings and functionally shaped motions—shall be utilized to raise all the objections and defenses made available. This has been presaged in the provisions of Rule 7 (c), abolishing demurrers and pleas, and thus leaving only pleadings and the motion remaining as available devices out of the traditional arsenal. (2) Except for the possible objections to mere forms of pleadings, all the traditional defenses, whether characterized as merely formal, dilatory, or on the merits, may be raised together, and for the first time, in the required responsive pleadings. This departs from the traditional code approach which required certain defenses, both dilatory and on the merits, to be raised, at peril of waiver, by demurrer, when they appear on the face of the pleading (former §§ 1-127, 1-133). Taking a different approach, this rule instead merely gives the option to any defensive pleader to raise seven enumerated objections and defenses by motion prior to filing his responsive pleading [Rule 12 (b)]; and the option to either party to then have such motion-raised defenses heard preliminarily unless the court defers consideration of them to trial time [Rule 12 (d)].

The third sentence in section (b) has as its purpose the clarification of the preceding sentence. Ordinarily, of course, a motion making any of the listed defenses should be made before pleading. But the failure to do so is not preclusive in all circumstances and as to all defenses, as sections (g) and (h) of this rule make clear.

The only ones of the traditional objections to mere form which are retained are the motion to make more definite and certain and the motion to strike. It must be assumed that in the context of the federal pleading approach the motion to make more definite and certain will be utilized with much more restraint, generally only when such ambiguity exists that the responsive pleader cannot reasonably be required to plead to the pleading under attack. See generally 2 *Moore's Federal Practice* Pars. 12.18 and 12.20.

The most direct analogue to the code demurrer for failure to state facts sufficient to constitute a cause of action, which is abolished under this procedure, is the motion to dismiss for failure to state a claim upon which relief can be granted. [Rule 12 (b) (6)]. In a general way it can be said that this motion is typically honored in federal practice under the same circumstances that a demurrer is sustained and action dismissed in State practice because the pleading attacked contains a "statement of a defective cause of action," as opposed merely to a "defective statement of good cause of action." Compare, for example, Turner v. Gastonia City Bd. of Educ., 250 N.C. 456, 109 S.E.2d 211 (1959), illustrating application of the "defective cause" rule under existing State demurrer practice, with DeLoach v. Crawley's Inc., 128 F.2d 378 (5th Cir. 1942), illustrating dismissal rule on motion to dismiss under federal Rule 12 (b) (6). Unlike the State practice demurrer, this motion to dismiss may "speak." [Rule 12 (b), last sentence].

The waiver provisions of Rule 12 (h) provide in effect that the defenses of failure to state a claim, or failure to join a necessary party may be raised at any time before verdict. After verdict however, the defenses of failure to state a claim and failure to join a necessary party cannot then be raised or noted for the first time. Lack of jurisdiction of the subject matter, of course, cannot be waived and is always available as a defense.

In addition to the motion to dismiss, analogous in a limited way to the demurrer as above stated, a motion for judgment on the pleadings is likewise provided in Rule 12 (c). It too has "speaking" capacities.

A defect in jurisdiction over the subject matter cannot be cured by waiver, consent, amendment or otherwise. Anderson v. Atkinson, 235 N.C. 300, 69 S.E.2d 603 (1952), decided under former § 1-134.

The objection that a prior action is pending between the same parties for the same cause is waived unless it is raised in the mode appointed by law. McDowell v. Blythe Bros. Co., 236 N.C. 396, 72 S.E.2d 860 (1952), decided under former § 1-134.

The court may strike out irrelevant or redundant matter inserted in a pleading upon motion of any party aggrieved, aptly made. Wall v. England, 243 N.C. 36, 89 S.E.2d 785 (1955); Girard Trust Bank v. Easton, 3 N.C. App. 414, 165 S.E.2d 252 (1969), decided under former § 1-153.

Irrelevant or redundant matter inserted in a pleading is subject to a motion to strike. Johnson v. Petree, 4 N.C. App. 20, 165 S.E.2d 757 (1969), decided under former § 1-153.

A motion to strike, made in apt time, is made as a matter of right. Sullivan v. Johnson, 3 N.C. App. 581, 165 S.E.2d 507 (1969), decided under former § 1-153.

A complaint must be fatally defective before it will be rejected as insufficient. Newman Mach. Co. v. Newman, 275 N.C. 189, 166 S.E.2d 63 (1969), decided under former § 1-127.

Rule 13. Counterclaim and crossclaim.

(a) *Compulsory counterclaims.*—A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if

(1) At the time the action was commenced the claim was the subject of another pending action, or

(2) The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

(b) *Permissive counterclaim.*—A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) *Counterclaim exceeding opposing claim.*—A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) *Counterclaim against the State of North Carolina.*—These rules shall not be construed to enlarge beyond the limits fixed by law the right to assert counterclaims or to claim credit against the State of North Carolina or an officer or agency thereof.

(e) *Counterclaim maturing or acquired after pleading.*—A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) *Omitted counterclaim.*—When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) *Crossclaim against coparty.*—A pleading may state as a crossclaim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such crossclaim may include a claim that the party against whom it is asserted is or may be liable to the crossclaimant for all or part of a claim asserted asserted in the action against the crossclaimant.

(h) *Additional parties may be brought in.*—When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or crossclaim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained.

(i) *Separate trial; separate judgment.*—If the court orders separate trials as provided in Rule 42 (b), judgment on a counterclaim or crossclaim may be rendered in accordance with the terms of Rule 54 (b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of. (1967, c. 954, s. 1.)

Comment. — Sections (a) through (f) deal with counterclaims that must and those that may be asserted in an action, i.e., with compulsory and permissive counterclaims.

Compulsory counterclaims.—There is no current statutory provision which in terms makes any counterclaim compulsory. However, certain counterclaims have traditionally been made compulsory in effect by application of res judicata principles. The judicially evolved rule is that a party will be barred from maintaining an action if in a prior or pending action he could have obtained the same relief by permissive counterclaim and if a judgment for plaintiff in the former or pending action would collaterally estop the plaintiff in the second in respect of determinative issues. Thus, most typically, when a party is sued for damages arising out of negligent operation of an automobile, he must assert any claim for damages he may have arising out of the same occurrence by counterclaim, at peril of being barred from thereafter asserting the claim by separate action. Allen v. Salley, 179 N.C. 147, 101 S.E. 545 (1919). Rule 13 (a) states this substantially, but with more directness, and in a way which avoids some possible question about the application of the North Carolina judicial rule to a second action when plaintiff in the first action lost. Basically, this rule should cause no actual change in the practice in respect to those claims which counsel for defendants will feel under compulsion to assert by counterclaim at peril of being barred to assert them separately.

Three necessary exceptions to the basic rule of compulsion are provided in this section. A counterclaim otherwise compulsory under the rule need not be asserted: (1) If parties necessary to its adjudication cannot be subjected to jurisdiction; or (2) if the pleader has already asserted the claim in another pending action; or (3) if to counterclaim would subject the pleader to personal jurisdiction in respect of a merely quasi in rem claim by the plaintiff, as to which the pleader is not otherwise amenable to personal jurisdiction. Furthermore, possible relief against the consequences of failure to assert a normally compulsory counterclaim is provided in section (f) which gives the court discretion to allow a compulsory counterclaim to be added by amendment.

Permissive counterclaim. — Under former code practice, two types of counterclaim were permissive: (1) Any contract claim existing at the commencement of the plaintiff's action, when the plaintiff's claim is in contract, and (2) any claim arising out of the same contract or transaction which is the basis of plaintiff's action (usually compulsory under the res judicata rule).

The rule in section (b) is much broader. In fact, it is unlimited in its terms — a pleader may at his option assert any claim he may have against an opponent which he is not compelled by section (a) to assert. This approach parallels that of the unlimited joinder of claims philosophy of Rule 18. The idea is that so far as the basic structuring of the litigation at the pleading stage is concerned, there should be unlimited ability to join opposing as well as parallel claims—and that the appropriate protection against trial of an overly complex case resulting from unlimited counterclaim assertion right is by severance for separate trial subsequently under Rule 42 (b).

Section (c).—This section states existing case law in North Carolina. See 1 McIntosh, *North Carolina Practice and Procedure*, § 1238 (2d ed. 1956).

Section (d).—This section is self-explanatory.

Section (e).—This section allows the assertion by supplemental pleading, with leave of court, of counterclaims maturing or acquired after the pleader has already filed his defensive pleading. This is a direct and simple handling of a problem as to which confusion had existed under code practice. Under former § 1-137, a counterclaim might be asserted under the contract section only if it was in existence at the time of commencement of plaintiff's action, but no such limitation was stated with respect to counterclaims under the same transaction section. But, of course, these also may arise out of contract, and some confusion existed in applying the statute. See 1 McIntosh, *North Carolina Practice and Procedure*, § 1242 (2d ed. 1956). This rule makes no distinction based on types of counterclaim, but simply provides that any subsequently acquired counterclaim may, if the court deems it proper on a whole view of the matter, be injected into litigation after the initial pleading has already been served.

Crossclaims between parties similarly aligned, as coplaintiffs or codefendants. — Rule 13 (g), following the general philosophy of an unlimited option by pleaders to join any claims and assert any counterclaims at the pleading stage, lays down a very liberal policy for asserting crossclaims between coparties. There is, however, a limitation, not found with respect to permissive claim joinder under Rule 18, or permissive counterclaim assertion under Rule 13 (b). The crossclaim must arise out of the same transaction or occurrence on which the basic claims and counterclaims are based, or must relate to property which is the subject matter of the original action. Thus, coparties cannot as a matter of right inject claims between themselves which have not even a general historical relation to the basic claims in litigation between plaintiffs and defendants. But, given the general historical relation expressed in the concept, "arising out of the same transaction or occurrence," there is no further requirement that the crossclaim relate substantively to the basic claim or counterclaim—or that it in some way affect the party asserting these basic claims. Thus, most typically, where A sues B and C for personal injury damages as alleged joint tort-feasors, B and C may crossclaim against each other in respect of independent claims for personal injury or property damage alleged to have resulted from the same occurrence out of which A's claim arose. Certainly the most common bases for crossclaims are those for contribution or indemnification in respect of the crossclaimant's alleged liability, and the last sentence of Rule 13 (g) specifically authorizes these bases.

This represents a substantial departure from former code practice which, without specific statutory directive, had slowly evolved a much more restrictive judicial rule for permissible crossclaims between coparties. Thus, it was held under the code that the only permissible crossclaim was one for indemnification based on a noncontractual right (e.g., primary as opposed to secondary tort liability). Specifically forbidden was any crossclaim by one codefendant against another for: (1) Personal injury or property damage to the claimant, notwithstanding it "arose out of the same occurrence" as plaintiff's primary claim. Jarrett v. Brogdon, 256 N.C. 693, 124 S.E.2d 850 (1962); (2) contribution in respect of the crossclaimant's liability to plaintiff. Bass v. Lee, 255 N.C. 73, 120 S.E.2d 570 (1961); and (3) indemnification if based on an express or implied contract to indemnify crossclaimant in respect of his liability to plaintiff. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963). See generally, tracing the evolution of the permissible crossclaim rules to their present state, Note, 40 N.C.L. Rev. 633 (1962).

Section (h).—This section states existing North Carolina case law. Bullard v. Berry Coal & Oil Co., 254 N.C. 756, 119 S.E.2d 910 (1961) (when A sues B in negligence and B counterclaims, B may have C brought in to defend against counterclaim on allegations that C is vicariously liable thereon in respect of A's alleged negligence).

Here again, with respect to the liberal attitude toward allowable crossclaims, the notion is that if over-complexity results for the purposes of trial, severance and separate trials under Rule 42 (b) is the appropriate action, rather than preventing the assertion of crossclaims at the pleading stage.

Section (i). — This section incorporates the provisions of Rule 54 (b) to allow the entering of "final judgment" in respect to particular counterclaims or crossclaims, notwithstanding the whole action is not yet ripe for judgment.

Editor's Note. — For comment on the definition and scope of res judicata in North Carolina, see 5 Wake Forest Intra. L. Rev. 315.

Wider Range of Cross Actions between Coparties Authorized.—The new Rules of Civil Procedure authorize a much wider range of cross actions between coparties than heretofore permissible. Anderson v. Robinson, 275 N.C. 132, 165 S.E.2d 502 (1969).

Cited in Watson v. Carr, 4 N.C. App. 287, 166 S.E.2d 503 (1969).

Rule 14. Third-party practice.

(a) *When defendant may bring in third party.*—At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. Leave to make the service need not be obtained if the third-party complaint is filed not later than five days after the answer to the complaint is served. Otherwise leave must be obtained on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defense to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and crossclaim against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and crossclaims as provided in Rule 13. Any party may move for severance, separate trial, or dismissal of the third-party claim. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

Where the normal statute of limitations period in an action arising on a contract is extended as provided in G.S. 1-47 (2) or in any action arising on a contract or promissory note, upon motion of the defendant the court may order to be made parties additional defendants, including any party of whom the plaintiff is a subrogee, assignee, third-party beneficiary, endorsee, agent or transferee, or such other person as has received the benefit of the contract by transfer of interest.

(b) *When plaintiff may bring in third party.*—When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so. (1967, c. 954, s. 1; 1969, c. 810, s. 2.)

Comment. — Certainly one of the most unsatisfactory areas of North Carolina procedural law was that concerned with what has come to be called "third-party practice." By this is meant the basis upon which and the procedure whereby an original defendant (third-party plaintiff) may implead—have brought into the action—an additional party (third-party defendant) to defend against a claim over by the original defendant/third-party plaintiff. An adequate procedural rule dealing with this important and frequently encountered problem must at least: (1) Specify the substantive grounds permitting impleader, and (2) clearly set out the procedure by which it may be accomplished. For a comprehensive coverage, it should additionally prescribe the kinds of claims which, after impleader has been accomplished, may then be asserted by the parties — originally plaintiff, third-party plaintiff, and third-party defendants—inter se. North Carolina statutory law did none of these in adequate, direct terms. Because of the desirability of allowing impleader in some situations at least, the North Carolina court constructed a set of judicial rules for impleading by drawing upon certain statutes which suggested its use peripherally or in a specific situation, but which were completely inadequate if gauged by the standards of adequate coverage above suggested. Thus, former § 1-73, providing in part that the court might cause parties to be brought in when necessary to a complete determination of the controversy; former § 1-222, providing in part that a judgment might be given for or against one or more of several defendants, might determine the rights of the parties on each side, as between themselves, and might grant a defendant any affirmative relief to which entitled; and § 1-240, cryptically providing for the impleading of alleged joint tort-feasors by an original alleged tort-feasor defendant, were drawn upon by the court. As indicated, none of these statutes dealt directly with the basic problems: (a) Of grounds for impleading (except § 1-240, dealing narrowly with contribution between joint tort-feasors); (b) of the procedure by which a third-party plaintiff actually impleads a third-party defendant; or (c) of the kinds of claims that may, after impleader is accomplished, be asserted by the parties inter se.

Working with this completely inadequate statutory pattern, the court has, over the years, evolved rules and sanctioned procedures for impleading which can only be found by resort to the decided cases. These rules as evolved are, aside from the difficulty of locating them, subject to criticism because of their narrowness of approach to the grounds on which impleading is allowed in the first place, and then to the question of what claims may properly be asserted after impleading by the parties inter se. Thus, the basic rule which has evolved to control impleadings permits impleading only when the claim by the third-party plaintiff is for: (1) Contribution against an alleged joint tort-feasor under § 1-240, or (2) indemnification, but only when the indemnification right arises as a matter of law, and not when it arises by express or implied contract. See, for a summary of this rule and the basis of its evolution, 1 McIntosh, *North Carolina Practice and Procedure*, § 722 (2d edition 1956, with 1965 Supplement). The court is not always consistent in this distinction. See Davis v. Radford, 233 N.C. 283, 63 S.E.2d 822 (1951).

Beyond this, no systematic prescription of the additional claims which may thereafter be asserted between third-party plaintiff and third-party defendant, and between plaintiff and third-party defendant has been worked out in the North Carolina cases. And, as pointed out, this is not provided in the statutes. It is clear only that an impleaded third-party defendant may, but is not compelled to, assert against the third-party plaintiff any claim which would, as to the third-party plaintiff's claim, meet the permissive counterclaim test of former § 1-123. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957) (permissive); Morgan v. Brooks, 241 N.C. 527, 85 S.E.2d 869 (1955) (but not compulsory).

None of the statutes drawn upon prescribed the exact procedure for impleading. Thus, there was no statutory directive as to whether it shall be done by "cross complaint" in the original defendant's answer, or by separate "third-party complaint"; as to whether it requires an order of court based upon motion and notice, or an order entered ex parte; nor as to what mode of service of the third-party complaint or cross complaint shall be utilized. In the absence of any such directive, a practice, generally standardized, but with many variants has been evolved. It has received at least indirect sanction from the court by constant reference to its use without comment. See 1 McIntosh, *North Carolina Practice and Procedure*, § 722.5 (1965 Pocket Supplement). This practice is cumbersome, and, as indicated, not by any means completely standardized.

In contrast to this most unsatisfactory situation, federal Rule 14 provides a directive for third-party practice which is comprehensive in its coverage. The substantive test for impleading is stated directly—a party may be impleaded "who is or may be liable to [the third-party plaintiff] for all or part of the plaintiff's claim against him." This obviously gives the right to implead for contribution and indemnification, where the substantive right to those remedies exists by statute or common law. This is the limit of the impleading right judicially evolved under North Carolina practice. The federal rule is construed to go beyond this and allow impleading for indemnification where the right to be indemnified has arisen out of contract. See, e.g., Watkins v. Baltimore & O. Ry., 29 F. Supp. 700 (W.D. Pa. 1939). This would broaden the North Carolina approach. Note that it still does not allow impleading on as liberal a basis as exists for crossclaims between parties originally joined as defendants. There, under federal Rule 13, the only requirement is relation between the crossclaim and the transaction or occurrence forming the basis of plaintiff's claim.

Beyond the direct and plain statement of the substantive test for impleading, the federal rule prescribes clearly and concisely the procedure for impleading where the right exists. This, as pointed out, is not done in the North Carolina statutes.

Finally, federal Rule 14 concludes with a clear statement, likewise lacking in State statutes, of the various claims which may, after a third-party defendant is impleaded, be asserted by the various parties inter se. Here, as in the joinder statutes, the safeguard against undue complexity which might result under this rule's liberal allowance of permissible cross and counter claims is stated to be severance of claims in advance of trial.

It should be noted that federal Rule 14 is of course entirely procedural—it does not, indeed cannot—affect any substantive rights. Thus, it does not allow impleader unless the substantive right exists under State law. Accordingly, then, adoption of this rule does not affect any of the North Carolina substantive law of contribution or indemnification.

Editor's Note. — The 1969 amendment added the second paragraph of section (a).

Session Laws 1969, c. 810, s. 2, amending this rule, further provides: "It is the purpose of this section to insure that if a suit may be maintained on a contract against one contracting party, the other contracting party will not be allowed to escape his contractual obligations by the passage of time or the transfer of contract rights."

Session Laws 1969, c. 810, s. 3, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on or after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act no significance shall be attached to the fact that this act was enacted at a later date."

Rule 15. Amended and supplemental pleadings.

(a) *Amendments.*—A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.

(b) *Amendments to conform to the evidence.*—When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) *Relation back of amendments.*—A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

(d) *Supplemental pleadings.*—Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which may have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or defense.

If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor. (1967, c. 954, s. 1.)

Comment.—This rule is, except for section (c), substantially a counterpart to federal Rule 15. Section (c) is drawn from the New York Civil Practice Law and Rules, Rule 3025. As such, it deals with a most critical aspect of the whole approach of these rules to the pleading function. This is most obvious in its basic directive for the allowing of amendments to pleading. In this aspect, its approach is generally that of the codes, with the basic theme being to allow amendment as of right up to the time that the opponent has taken his initial position by responsive pleading, and thereafter to make the privilege to amend more and more difficult to obtain as the litigation progresses and positions may accordingly have become more and more hardened on the basis of the original pleadings. However, a fundamental change of approach from existing practice is taken in (1) the generality with which this basic theme is formulated and (2) this rule's abandonment in terms of the whole variance conception so integral a part of the code amendment scheme.

Section (a). — This section first states the rule for amendment as of right up to responsive pleading time, thus basically making no change in the former law, § 1-161. But then, in dealing with the whole problem of discretionary amendments after this time and up to the time that amendments are sought to conform to proof already adduced, this rule merely lays down the simple directive that leave to amend in this interval shall be freely given "when justice so requires." This is a deliberate abandonment of the typical code approach, as found in former § 1-163, which attempted in tortuous fashion to lay down detailed directives for the exercise of this discretion. The result of this code formulation has been to necessitate equally tortured judicial construction which, instructively, still continues, 100 years after the code's adoption. See e.g., Perkins v. Langdon, 233 N.C. 240, 63 S.E.2d 565 (1951). However, the phrase "as justice requires" has acted as an effective limitation on the amendment privilege in the federal courts. For when, on a whole view of the matter, as is freqently the case, it is determined that justice does not require a particular amendment, or that, to the contrary, positive injustice to the opposing party would result, amendment has been denied. See, e.g., Friedman v. Transamerica Corp., 5 F.R.D. 115 (D. Del. 1946); Portsmouth Baseball Corp. v. Frick, 21 F.R.D. 318 (S.D.N.Y. 1958). This is a much preferable type directive to the detailed code directive which has seemed to necessitate an obviously mechanical jurisprudence in its application. Perkins v. Langdon, supra.

The last sentence of section (a) involves a departure of obvious import from the federal rule timetable.

Section (b). — This section involves the second major change in concept from code practice. Dealing with the problem of trial time amendments necessitated by the failure of proof to conform in some degree with pleadings, it deliberately abandons the laboriously constructed code scheme of immaterial variance, material variance and total failure of proof (former §§ 1-168, 1-169), and lays down a directive based directly upon the truly legitimate policy consideration which should control amendment privilege here, namely, whether, notwithstanding variance of some degree, there has nevertheless been informed consent to try the issues on the evidence presented. Here again, limitation on amendment privilege is sufficiently insured by the phrases, "when the presentation of the merits of the action will be served thereby," and its twin, "and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him." Indeed, it seems quite clear that the code directive was actually designed to get the same result, but that the very detail of its formulation led to a drift into a very mechanical approach which has now largely subverted the "litigation by consent" doctrine in North Carolina. See Note, 41 N.C.L. Rev. 647 (1963). Finally, the last sentence of this section inserts a final safeguard in its reminder of the continuance possibility.

Section (c).—This section deals with the extremely difficult matter of determining when amendments should "relate back" for statute of limitation purposes by posing the broad question of the relation between the new matter and the basic aggregate of historical facts upon which the original claim or defense is based. This deliberately avoids the more abstruse inquiry under the codes as to whether the amendment involves a "wholly different cause of action or defense." It is believed that this approach is a distinct improvement in its express reliance on the truly valid consideration of identity in the historical fact sense. Wachtell's comment on the provision in the New York Civil Practice Law and Rules from which section (c) is drawn is equally pertinent here. The rule, he says, is that "a cause of action in an amended pleading will be deemed to relate back to the commencement of the action if the original pleading gave notice of the transactions, occurrences, or series of transactions or occurrences to be proved under the amended pleading. The amended pleading will therefore relate back if the new pleading merely amplifies the old cause of action, or now even if the new pleading constitutes a new cause of action, provided that the defending party had originally been placed on notice of the events involved. For example, an amended cause of action for damages for breach of a contract would relate back where the original pleading alleged an action in equity to rescind the contract for fraud. And an amended cause of action against defendants for breach of an implied warranty of agency in entering into a contract would relate back even though the original pleading had alleged a cause of action upon the contract against the defendants as principals." Wachtell, *N.Y. Practice Under the C.P.L.R.* (1963), p. 141.

Section (d).—This section is in effect a general counterpart to former § 1-167, without some of the specific detail. No practical change in the procedure for filing supplemental pleadings should result under this rule.

Editor's Note.—The cases cited in this note were decided under former §§ 1-161 and 1-163.

For case law survey as to amendment of pleadings, see 45 N.C.L. Rev. 836 (1967).

The judge has broad discretionary powers to permit amendments to any pleading, process or proceeding either before or after judgment. George A. Hormel & Co. v. City of Winston-Salem, 263 N.C. 666, 140 S.E.2d 362 (1965).

The lower court may allow or disallow such amendments as it may think proper in the exercise of sound discretion, bearing in mind, of course, that the nature of the cause of action as previously chartered may not be substantially changed. Goldston Bros. v. Newkirk, 234 N.C. 279, 67 S.E.2d 69 (1951).

Whether the trial court should allow an amendment to the pleadings rests in the court's sound discretion, and the court's ruling thereon is not reviewable on appeal. Sawyer v. Cowell, 241 N.C. 681, 86 S.E.2d 431 (1955).

An order allowing plaintiff to file an amended complaint and defendant time thereafter to answer is made in the court's discretion, and as such is not reviewable in the absence of manifest abuse. Williams v. Denning, 260 N.C. 539, 133 S.E.2d 150 (1963).

The motion to amend is addressed to the discretion of the court and the court's decision thereon is not subject to review, there being no showing or contention that the court abused its discretion. Perfecting Serv. Co. v. Product Dev. & Sales Co., 264 N.C. 79, 140 S.E.2d 763 (1965).

Presiding judge has almost unlimited authority to permit amendments either before or after judgment. Dobias v. White, 240 N.C. 680, 83 S.E.2d 785 (1954); Casstevens v. Wilkes Tel. Membership Corp., 254 N.C. 746, 120 S.E.2d 94 (1961).

Power Is Broader as to Amendments Proposed before Trial.—The scope of the court's power to allow amendments is broader when dealing with amendments proposed before trial than during or after trial. Modern Elec. Co. v. Dennis, 255 N.C. 64, 120 S.E.2d 533 (1961); George A. Hormel & Co. v. City of Winston-Salem, 263 N.C. 666, 140 S.E.2d 362 (1965); Lane v. Griswold, 273 N.C. 1, 159 S.E.2d 338 (1968).

Power to Amend Independent of Statute.—The superior courts possess an inherent discretionary power to amend pleadings or allow them to be filed at any time unless prohibited by some statute, or unless vested rights are interfered with. Gilchrist v. Kitchen, 86 N.C. 20 (1882); Cantwell v. Herring, 127 N.C. 81, 37 S.E. 140 (1900); Wheeler v. Wheeler, 239 N.C. 646, 80 S.E.2d 755 (1954).

The superior court possesses an inherent discretionary power to amend pleadings at any time, and amendments should be liberally allowed. Gilliam Furniture, Inc. v. Bentwood, Inc., 267 N.C. 119, 147 S.E.2d 612 (1966).

The court in its discretion may, before or after judgment, amend any pleading by inserting other allegations material to the case, or, when the amendment does not change substantially the claim, by conforming the pleading or proceeding to the facts. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964).

Amendment Which Only Adds to Original Cause May Be Allowed.—The allowance of an amendment which only adds to the original cause of action is not such substantial change as to amount to an abuse of discretion. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964); Gilliam Furniture, Inc. v. Bentwood, Inc., 267 N.C. 119, 147 S.E.2d 612 (1966).

Amendment Permissible When It Introduces No New Cause.—Unless its effect is to add a new cause of action or change the subject matter of the original action, no objection can successfully be urged where the amendment is germane to the original action, involving substantially the same transaction and presenting no real departure from the demand as originally stated. Lefler v. Lane & Co., 170 N.C. 181, 86 S.E. 1022 (1915); City of Wilmington v. Board of Educ., 210 N.C. 197, 185 S.E. 767 (1936); Wheeler v. Wheeler, 239 N.C. 646, 80 S.E.2d 755 (1954).

An amendment to a complaint which makes the pleading conform to the evidence, and does not change the claim of the plaintiff, is permissible. Chaffin v. Brame, 233 N.C. 377, 64 S.E.2d 276 (1951).

A trial court may permit a pleading to be amended at any time unless the amendment in effect modifies or changes the cause of action and deprives defendant of a fair opportunity to assemble and present his evidence relative to the matters asserted in the amendment. Thompson v. Seaboard Air Line Co., 248 N.C. 577, 104 S.E.2d 181 (1958).

The right to amend pleadings does not permit the litigant to set up a wholly different cause of action or change substantially the form of the action originally sued upon. Anderson v. Atkinson, 235 N.C. 300, 69 S.E.2d 603 (1952).

The court may not permit a litigant to set up by amendment a wholly different cause of action or an inconsistent cause. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964).

An amendment is permitted, in the discretion of the court, when the amendment does not change substantially the claim or defense. Lane v. Griswold, 273 N.C. 1, 159 S.E.2d 338 (1968).

The right to amend pleadings does not permit the litigant to set up a wholly different cause of action or change substantially the form of the action originally sued upon. Lane v. Griswold, 273 N.C. 1, 159 S.E.2d 338 (1968).

The court may not permit a litigant to set up by amendment a wholly different cause of action or an inconsistent cause. Lane v. Griswold, 273 N.C. 1, 159 S.E.2d 338 (1968).

When Amendment Introducing New Cause May Be Allowed.—Where no statute of limitations is involved, it is permissible to allow a plaintiff to introduce a new cause of action by way of amendment for damages for detention of property, possession of which was sought by the action as begun, if the facts constituting the new cause of action arise out of or are connected with the transactions upon which the original complaint is based. Mica Indus. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

Where plaintiff, in amendments to her complaint, for the first time stated facts sufficient to constitute a cause of action, the cause of action then stated embraced relevant facts connected with the transactions forming the subject of her prior pleadings. Hence, absent the bar of an applicable statute of limitations, such new cause of action may be introduced by way of amendment of plaintiff's prior pleadings. Stamey v. Rutherfordton Elec. Membership Corp., 249 N.C. 90, 105 S.E.2d 282 (1958).

It is permissible to allow plaintiff to introduce a new cause of action by way of amendment if the facts constituting the new cause of action arise out of or are connected with the transactions upon which the original complaint is based. Gilliam Furniture, Inc. v. Bentwood, Inc., 267 N.C. 119, 147 S.E.2d 612 (1966).

Time of Amendment as Matter of Right.—After the time allowed for answering a pleading has expired, such pleading may not be amended as a matter of right, but only in the discretion of the court. Consolidated Vending Co. v. Turner, 267 N.C. 576, 148 S.E. 531 (1966).

Extension of Time for Filing Amendment.—Where an amended complaint is filed after expiration of the time allowed in the order permitting the filing of the amendment, the trial court has the discretionary power to enter an order extending the time for the filing of the amendment to the date of the hearing and overrule defendant's motion to strike on the ground that the amendment was filed after the expiration of the time allowed. Alexander v. Brown, 236 N.C. 212, 72 S.E.2d 522 (1952).

Amendment of Defective Summons.—When the summons bears the seal of the clerk and there is evidence it actually emanated from the clerk's office, or the jurat of the clerk and his signature appears below the cost bond, the paper bears internal evidence of its official character and the defect may be cured by amendment. When it does not bear some such evidence, it is void and not subject to amendment. Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952).

If the summons bears internal evidence of its official origin and of the purpose for which it was issued, it comes within the definition of original process and may be amended by permitting the clerk to sign nunc pro tunc. This rule is subject to the limitation that such alteration of the record must not disturb or impair any intervening rights of third parties. Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952).

But if there is nothing upon the face of the paper which stamps upon it unmistakably an official character, it is not a defective summons but no summons at all—"no more than one of the usual printed blanks kept by the clerks of the courts." The curative power of amendment may not be invoked when there is nothing upon the face of the paper to give assurance that it received the sanction of the clerk before it was delivered to the sheriff to be served. Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952).

Plaintiff Allowed to Amend to Designate Herself as Administratrix.—The court has plenary power to permit plaintiff, who in fact was duly appointed administratrix at the time a complaint was filed, to amend the caption in the complaint in order to designate herself as administratrix in conformity with the allegation in the complaint. Graves v. Welborn, 260 N.C. 688, 133 S.E.2d 761 (1963).

Bringing in Insurance Company Which Has Paid Part of Plaintiff's Loss. — An insurance company which pays the insured for a part of the loss is entitled to share to the extent of its payment in the proceeds of the judgment in the action brought by the insured against the tort-feasor to recover the total amount of the loss, and may be brought into the action by the court in the exercise of its discretionary power to make new parties at the instance of the insured or the tort-feasor either in the capacity of an additional plaintiff or in the capacity of an additional defendant. Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952), commented on in 31 N.C.L. Rev. 224 (1953).

Substituting Another Corporation for Original Plaintiff. — In an action for an injunction by plaintiff corporation arising out of a contract entered into between another corporation and the defendant, the trial court did not have the power to substitute the other corporation as plaintiff in lieu of the original plaintiff. Orkin Exterminating Co. v. O'Hanlon, 243 N.C. 457, 91 S.E.2d 222 (1956).

Amending Complaint under Wrongful Death Statute So as to Bring Action within Federal Employers' Liability Act.—Where the complaint alleges damages for wrongful death under State statute, but the evidence shows that the deceased was an employee of a railroad company and was fatally injured while engaged in the discharge of his duties in interstate commerce, the court plainly has power to allow plaintiff to amend so as to allege that the parties were engaged in interstate commerce and that plaintiff was the sole dependent of the deceased, so as to bring the action within the Federal Employers' Liability Act; and this notwithstanding such amendment was allowed more than three years after the death of decedent. Graham v. Atlantic Coast Line R.R., 240 N.C. 338, 82 S.E.2d 346 (1954).

Amendment Alleging Failure of Defendant to Keep Proper Lookout.—Where the facts alleged in a complaint were sufficient to imply by a fair and reasonable intendment that defendant failed to keep a proper lookout, the court had the discretionary power even after judgment to permit plaintiff to amend to allege specifically such failure. Moreover, the court had the authority to allow such amendment even if the original complaint did not allege by necessary implication defendant's failure to keep a proper lookout. Simrel v. Meeler, 238 N.C. 668, 78 S.E.2d 766 (1953).

Amendment as to Identity of Driver of Automobile.—In an action involving negligent operation of an automobile resulting in death, it was not error to allow, upon motion made after verdict, an amendment to conform the complaint to the finding of the jury as to the identity of the driver of the automobile, where the crucial fact in respect to defendant's liability was not the identity of the driver, but that defendant, the owner of the automobile, permitted or directed its operation. Litaker v. Bost, 247 N.C. 298, 101 S.E.2d 31 (1957).

Motion Made after Verdict. — Where a motion for leave to amend a complaint to conform to the facts established by the verdict was not made until after the verdict, it was not error to grant it, since the trial below was conducted as if the amendment had been made and the amendment did not change substantially the plaintiff's claim. Litaker v. Bost, 247 N.C. 298, 101 S.E.2d 31 (1957).

Amendment Not Permitted Five Days Before Appeal Is to Be Heard.—Where a proposed amendment sets up a wholly different cause of action or changes substantially the action originally sued upon, this cannot be done five days before an appeal is to be heard in the Supreme Court. George A. Hormel & Co. v. City of Winston-Salem, 263 N.C. 666, 140 S.E.2d 362 (1965).

Review of Ruling Denying Motion.—Where a motion to amend is denied in the discretion of the trial judge, his ruling is not reviewable in the absence of a clear showing of abuse of discretion. Consolidated Vending Co. v. Turner, 267 N.C. 576, 148 S.E.2d 531 (1966).

The discretionary denial by the trial court of a motion to amend the pleadings and process is not reviewable in the absence of manifest abuse of discretion. Crump v. Eckerd's, Inc., 241 N.C. 489, 85 S.E.2d 607 (1955).

Rule 16. Pre-trial procedure; formulating issues.

In any action, the judge may in his discretion direct the attorneys for the parties to appear before him for a conference to consider

(1) The simplification and formulation of the issues;
(2) The necessity or desirability of amendments to the pleadings;
(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
(4) The limitation of the number of expert witnesses;
(5) The advisability or necessity of a reference of the case, either in whole or in part;
(6) Matters of which the court is to be asked to take judicial notice;
(7) Such other matters as may aid in the disposition of the action.

If a conference is held, the judge may make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. If any issue for trial as stated in the order is not raised by the pleadings in accordance with the provisions of Rule 8, upon motion of any party, the order shall require amendment of the pleadings. (1967, c. 954, s. 1.)

Comment. — While the Rules of Civil Procedure do not envisage a pre-trial conference in every case, they do contemplate a significant role for such conferences. The Commission knows that where former statutes have been used systematically, excellent results have been achieved. 36 N.C.L. Rev. 521 (1958).

Two significant changes are embodied in this rule. First, whether there is to be a pre-trial conference is made an entirely discretionary matter with the judge. It was the Commission's view that pre-trial cannot function effectively unless the judge himself is committed to the desirability of a resort to the procedure. Second, a requirement has been added that if the pre-trial order contains an issue not raised by the pleadings, the court, on motion of any party, shall order an amendment.

Editor's Note.—For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965).

For article on pre-trial and discovery, see 5 Wake Forest Intra. L. Rev. 95 (1969).

The purpose of a pre-trial conference is to consider specifics, among them motions to amend pleadings, issues, references, admissions, judicial notice, and other matters which may aid in the disposition of the cause. Whitaker v. Beasley, 261 N.C. 733, 136 S.E.2d 127 (1964); Smith v. City of Rockingham, 268 N.C. 697, 151 S.E.2d 568 (1966), decided under former § 1-169.1.

Pre-trial order is interlocutory, from which an appeal does not lie. Green v. Western & S. Life Ins. Co., 250 N.C. 730, 110 S.E.2d 321 (1959); Smith v. City of Rockingham, 268 N.C. 697, 151 S.E.2d 568 (1966), decided under former § 1-169.1.

ARTICLE 4.

Parties.

Rule 17. Parties plaintiff and defendant; capacity.

(a) *Real party in interest.*—Every claim shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the State so provides, an action for the use or benefit of another shall be brought in the name of the State of North Carolina. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) *Infants, incompetents, etc.*—

(1) Infants, etc., Sue by Guardian or Guardian Ad Litem.—In actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, whether residents or nonresidents of this State, they must appear by general or testamentary guardian, if they have any within the State or by guardian ad litem appointed as hereinafter provided; but if the action or proceeding is against such guardian, or if there is no such known guardian, then such persons may appear by guardian ad litem. The duty of the State solicitors to prosecute in the cases specified in chapter 33 of the General Statutes, entitled "Guardian and Ward," is not affected by this section.

(2) Infants, etc., Defend by Guardian Ad Litem. — In actions or special proceedings when any of the defendants are infants or incompetent persons, whether residents or nonresidents of this State, they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided; and if they have no known general or testamentary guardian in the State, and any of them have been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such infants, or incompetent persons, and fix and tax his fee as part of the costs. The guardian so appointed shall, if the cause is a civil action, file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After 20 days' notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant or incompetent persons or defendants.

(3) Appointment of Guardian Ad Litem Notwithstanding the Existence of a General or Testamentary Guardian.—Notwithstanding the provisions of subsections (b) (1) and (b) (2), a guardian ad litem for an infant or incompetent person may be appointed in any case when it is deemed by the court in which the action is pending expedient to have the infant, or insane or incompetent person so represented, notwithstanding such person may have a general or testamentary guardian.

(4) Appointment of Guardian Ad Litem for Unborn Persons.—In all actions in rem and quasi in rem and in all actions and special proceedings which involve the construction of wills, trusts and contracts or any instrument in writing, or which involve the determination of the ownership of property or the distribution of property, if there is a possibility that some person may thereafter be born who, if then living, would be a necessary or proper party to such action or special proceeding, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem to defend on behalf of such unborn person. Service upon the guardian ad litem appointed for such unborn person shall have the same force and effect as service

living. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(5) Appointment of Guardian Ad Litem for Corporations, Trusts, or Other Entities Not in Existence.—In all actions which involve the construction of wills, trusts, contracts or written instruments, or the determination of the ownership of property or the disposition or distribution of property pursuant to the provisions of a will, trust, contract or written instrument, if such will, trust, contract or written instrument provides benefits for disposition or distribution of property to a corporation, a trust, or an entity thereafter to be formed for the purpose of carrying into effect some provision of the said will, trust, contract or written instrument, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem for such corporation, trust or other entity. Service upon the guardian ad litem appointed for such corporation, trust or other entity shall have the same force and effect as service upon such corporation, trust or entity would have had if such corporation, trust or other entity had been in existence. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(6) When Guardian Ad Litem Not Required in Domestic Relations Actions.—Notwithstanding any other provisions of this rule, an infant who is competent to marry, and who is 18 years of age or older, is competent to prosecute or defend an action or proceeding for his or her absolute divorce, divorce from bed and board, alimony pendente lite, permanent alimony with or without divorce, or an action or proceeding for the custody and support of his or her child, without the appointment of a guardian ad litem.

(7) Miscellaneous Provisions.—The provisions of this rule are in addition to any other remedies or procedures authorized or permitted by law, and it shall not be construed to repeal or to limit the doctrine of virtual representation or any other law or rule of law by which unborn persons or nonexistent corporations, trusts or other entities may be represented in or bound by any judgment or order entered in any action or special proceeding. This rule shall apply to all pending actions and special proceedings to which it may be constitutionally applicable. All judgments and orders heretofore entered in any action in which a guardian or guardians ad litem have been appointed for any unborn person or persons or any nonexistent corporations, trusts or other entities, are hereby validated as of the several dates of entry thereof in the same manner and to the full extent that they would have been valid if this rule had been in effect at the time of the appointment of such guardians ad litem; provided, however, that the provisions of this sentence shall be applicable only in such cases and to the extent to which the application thereof shall not be prevented by any constitutional limitation.

(c) *Guardian ad litem for infants, insane or incompetent persons; appointment procedure.*—When a guardian ad litem is appointed to represent an infant or insane or incompetent person, he must be appointed as follows:

(1) When an infant or insane or incompetent person is plaintiff, the appointment shall be made at any time prior to or at the time of the commencement of the action, upon the written application of any relative or friend of said infant or insane or incompetent person or by the court on its own motion.

(2) When an infant is defendant and service under Rule 4 (j) (1) a or

Rule 4 (j) (1) b is made upon him the appointment may be made upon the written application of any relative or friend of said infant, or, if no such application is made within 10 days after service of summons, upon the written application of any other party to the action or, at any time by the court on its own motion.

(3) When an infant or insane or incompetent person is defendant and service can be made upon him only by publication, the appointment may be made upon the written application of any relative or friend of said infant, or upon the written application of any other party to the action, or by the court on its own motion, at any time after the filing of the affidavit required by Rule 4 (j) (1) c and before completion of publication, whereupon service of the summons with copy of the complaint shall be made forthwith upon said guardian so appointed requiring him to make defense at the same time that the defendant is required to make defense in the notice of publication.

(4) When an insane or incompetent person is defendant and service by publication is not required, the appointment may be made upon the written application of any relative or friend of said defendant, or upon the written application of any other party to the action, or by the court on its own motion, prior to or at the time of the commencement of the action, and service upon the insane or incompetent defendant may thereupon be dispensed with by order of the court making such appointment.

(d) *Guardian ad litem for persons not ascertained or for persons, trusts or corporations not in being.*—When under the terms of a written instrument, or for any other reason, a person or persons who are not in being, or any corporation, trust, or other legal entity which is not in being, may be or may become legally or equitably interested in any property, real or personal, the court in which an action or proceeding of any kind relative to or affecting such property is pending, may, upon the written application of any party to such action or proceeding or of other person interested, appoint a guardian ad litem to represent such person or persons not ascertained or such persons, trusts or corporations not in being.

(e) *Duty of guardian ad litem; effect of judgment or decree where party represented by guardian ad litem.*—Any guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules, unless extension of time is obtained. After the appointment of a guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability, had been ascertained and in being, and had been present in court after legal notice in the action in which such final judgment, order or decree is entered. (1967, c. 954, s. 1; 1969, c. 895, ss. 5, 6.)

Comment. — For historical reasons, an apparently necessary component of any procedural code or bloc of rules is a statement of the real party in interest generality, i.e., that action must be prosecuted in the name of the "real party in interest," as opposed to the name of any other person who may have a technical or nominal interest in the claim. This was deemed necessary for the purpose of allowing assignees of choses in action to sue in their own names to recover on the chose, a thing forbidden at common law—and this was probably the only thing had in mind in the original code. But the basic statement in the code was not so limited; hence, it was necessary also to add some obvious qualifications to the basic directive that actions can only be brought in the name of the presently beneficially interested—the "real" —party. Thus, certain fiduciaries should be allowed to sue in their own names on claims in which only their beneficiaries have beneficial—"real"—interests. Furthermore, the third-party contract beneficiary has well established substantive rights which he should be allowed to sue for in his own name, notwithstanding the contract parties alone are "real" parties to the contract and hence, possibly, to the rights arising under it. Finally, some exception was needed to take into account the fact that specific statutes may sometimes give rights to sue in their own names to parties not technically real parties in interest. Through what appears to be sheer whimsy in codification the original code "real party in interest" draft section, which put both the generality and its exception into one section, was modified in the North Carolina code version to separate the two components. Thus § 1-57 states the generality, while the exceptions were stated in former § 1-63. The federal Rule, 17 (a) dealing with the same matters, returns to the original code pattern and states both the generality and its exception as a connected whole. The rule as presented here tracks the federal rule, and rejects the State code separation of the concepts. No change of central substance is made from the present directive. Consequently, there is no reason to anticipate any change in real party in interest case law arising from this form of statement.

Closely related to the real party in interest generality and its exceptions is the problem of formal representation of persons not sui generis for the purpose of prosecuting and defending actions as to which the parties formally represented have the true beneficial interest—the problem, in short, of the appointment of, the appearance by, and the prosecution and defense of actions through guardians for infants and incompetents. Here, the present State statutory law is substantially retained, with some attempt to clean up and make more comprehensive the whole pattern.

GENERAL COMMENTS ON THE PROBLEMS DEALT WITH IN THE JOINDER RULES, RULES 18 to 21

The fundamental problem sought to be controlled by so-called joinder rules is that of the size which a single law suit shall on the one hand be compelled, and, on the other hand, permitted to assume. Hence, the rules of compulsory (minimum allowable size) and permissive (maximum allowable size) joinder. Since size depends both upon the number of claims (causes of action) and parties potentially involved, the rules of joinder have traditionally been separately framed in terms of parties and claims (causes of action).

PERMISSIVE JOINDER

The underlying policy controlling maximum permissible size is clear and has always been at least tacitly agreed upon under all procedural systems — namely, that the size should be as large as is compatible with orderly handling of issues and fairness to those parties not necessarily interested in all phases of the law suit as finally structured. This in turn is based upon the obvious—that economy of judicial effort is achieved by the resolution in one suit of as many claims, concluding as many parties, as is possible. The rub has come in laying down workable directions which are fairly simple in statement; which nevertheless deal adequately with the potentially two dimensional nature of the joinder problem (both parties and causes); and which, though couched in a form concrete enough for ready application, state what is essentially a quite flexibly conceived goal, i.e., maximum size commensurate with orderly handling of issues and fairness to all parties. One way to solve what is essentially a very difficult drafting problem is to lay down a fairly rigid, hence easily expressed, limitation in the kinds of cause of action which may be joined. If this is done, the problem of too many parties tends to take care of itself, since under traditional conceptions of the structure of a "cause of action," such a single judicial unit rarely has multiple parties aligned on either side of it (typically only when the substantive law contemplates the existence of parties jointly, or jointly or severally, entitled or obligated). Thus, in most cases of attempted joinder of multiple parties there will be a more basic joinder of causes of action which will come under control of the limitation applicable to joinder of causes. This was the common-law approach, which started out allowing only one claim to be made in any action, and finally relaxed only to the point of allowing joinder of causes when they all fell within one of the "forms of action." The code draftsmen, wedded to this approach, essentially codified it, merely using new terminology, e.g., "contract," in place of old "assumpsit," to define the categories within which joinder of claims is permissive. This approach is artificial, and actually loses sight of the basic policy which should control here, but it is simple to put into directive form, and it "works," albeit at the expense of legitimate considerations. When coupled, as it typically is in the codes, with procedural devices provided to attack misjoinder preliminary to trial, it produces a vast amount of skirmishing at this stage before trial is ever reached. This is the history of application of the code joinder rules. Here the emphasis is on artificial restriction of size, with leeway provided for movement in the direction of enlargement only through the power in judges to consolidate causes not technically subject to joinder.

Another approach, which is also simple of statement, is to go in exactly the opposite direction and state a basic directive for practically unlimited joinder of claims at the pleading stage, limited only by considerations of fairness to any parties not potentially interested in the totality of the law suit as then structured, leaving the burden on the judiciary to move in a restricted direction by exercise of the power of severance closer to trial time. This dispenses with pleading stage skirmishes over the alignment of the suit in terms of parties and claims, and defers ultimate structuring while preserving to the parties at this stage all the benefits of an ongoing uninterrupted law suit. This last is essentially a description of the federal rule approach to the problem of maximum permissible size or permissive joinder.

COMPULSORY JOINDER

Going to the problem of minimum allowable size (compulsory joinder), the Commission found that the underlying policy consideration here has traditionally been to insure that all "necessary" or "indispensable" parties should be involved in a law suit before it proceeds to trial, or certainly before it proceeds to judgment. Necessity and indispensability have always been viewed in this context as involving two aspects: First, necessity from the standpoint of the judicial economy of concluding in one law suit the total potential range of the controversy as defined in the pleadings; second, necessity from the standpoint of avoiding undue practical prejudice to absent parties (notwithstanding they are not legally concluded) by proceeding to trial and judgment without their presence.

There has never been considered to be any corresponding necessity to compel joinder of several causes of action, hence there have not been rules of "compulsory joinder of causes." The res judicata principle of merger by judgment arises at this stage in the form of the rule against "splitting a cause of action." This, in effect, sets the minimum allowable size of a law suit, so far as causes of action is concerned, at one such unit. Beyond this there is no compulsion to "join." Thus, the rules of compulsory joinder have always been rules of compulsory joinder of parties. Here, too, the problem has been to draft concretely to express the essentially flexible consideration of "necessity" above summarized. There has always been general agreement that all parties jointly entitled or obligated were "necessary" in the sense compelling their joinder, and this has been the rule from common-law days, through the codes, and under federal practice. Beyond the "jointly interested" or "united in interest" area, however, the directives have had to rely simply on general formulations of necessity in the sense above discussed. There is remarkably little change in phraseology designed to express this essential notion under the federal rule formulation from that under the codes.

MULTIPLE CAUSES AND PARTIES

A particularly difficult problem in framing permissive joinder directives is occasioned by the necessity for taking into account the possibility of both multiple causes and parties. As indicated, despite the inextricably two-dimensional nature of the joinder problem where multiple causes and parties are involved, the traditional approach has been to frame the joinder rules as if joinder of parties and causes were two separate and independent problems. Of course, where there is but a single claim (cause of action) the joinder rule directed solely at the party joinder limitations is completely adequate to control the matter. But where separately framed directives are used, they must be interrelated in some fashion in order to take into account the possibility of joinder of both claims and parties in a single suit. This poses a logical difficulty which has actually defied any but artificial solutions in any system which has sought to impose separately conceived limitations on joinder of parties and causes, and then to interrelate these limitations. Thus, one code solution has been (as in North Carolina) to resolve this logical dilemma by adding to the basic limitations on joinder of causes the all inclusive limitation that all causes must affect all parties. This is a possible solution, but it achieves relative certainty (only relative) at the expense of truly valid considerations of maximum permissible lawsuit size. Another approach, much more likely to achieve the desired goals, is to allow unlimited joinder of claims as such, and to impose limitations only in respect of parties, which limitations apply whether there is but a single or multiple causes of action (claims) involved. This is the federal rules approach and it has proven in practice not only to be more certain of application in given cases, but also to allow closer approximation to the true goals of permissive joinder, i.e., to allow as much to be concluded in any lawsuit as is commensurate with orderly handling of issues and fairness to parties not interested in the entire scope of the suit. Here again, ultimate protection against confusion of issues and unfairness can be provided by severance power reposed in the judiciary, and so it is under the federal rules approach.

Editor's Note. — The 1969 amendment added the last sentence to section (a), added present subsection (6) of section (b) and renumbered former subsection (6) of section (b) as (7).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1 (1969). For article on parties and joinder, see 5 Wake Forest Intra. L. Rev. 119 (1969).

A trustee may sue in his own name, or he may join his cestui que trust. Ingram v. Nationwide Mut. Ins. Co., 258 N.C. 632, 129 S.E.2d 222 (1963), decided under former § 1-63.

The trustee of an express trust may sue without joining the cestui que trust. Richardson v. Richardson, 261 N.C. 521, 135 S.E.2d 532 (1964), decided under former § 1-63.

Where a judgment is assigned to a trustee for the benefit of a judgment debtor, who is entitled to indemnity, the trustee may maintain the action for indemnity without joining the cestui que trust. Ingram v. Nationwide Mut. Ins. Co., 258 N.C. 632, 129 S.E.2d 222 (1963), decided under former § 1-63.

Commissioners to Sell Land and Pay Taxes.—Where a consent judgment directs named persons to sell and convey land, to collect the proceeds, to pay the taxes lawfully due, and to distribute the balance as directed, the persons named are trustees of an express trust, notwithstanding that the judgment denominates them as commissioners. Therefore, such persons were authorized to maintain an action for the recovery of taxes unlawfully paid without the joinder of the beneficial owners of the property. Rand v. Wilson County, 243 N.C. 43, 89 S.E.2d 779 (1955), decided under former § 1-63.

Where Property Has Been Distributed and Administrator Is Functus Officio. — Where a widow as executrix distributed in settlement the remaining personalty to herself as life tenant in accordance with the will, and the property then inured to the benefit of the remaindermen, she became functus officio as to such property. An administrator c.t.a., appointed after her death, was likewise functus officio and was not empowered to maintain an action to recover such property from her administrators, since it was no longer part of his testator's estate and not subject to further administration. Darden v. Boyette, 247 N.C. 26, 100 S.E.2d 359 (1957), decided under former § 1-63.

Infants are favorites of the courts, and the courts are duty-bound to protect their rights and interests in all actions and proceedings whether they are represented by guardians or not, and the Supreme Court will scan with extra care all records affecting the interest of minors. Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962), decided under former § 1-65.1.

The power of a next friend (now guardian ad litem) is strictly limited to the performance of the precise duty imposed upon him by the order appointing him; that is, the prosecution of the particular action in which he was appointed. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964), decided under former § 1-64.

Duty of Guardian ad Litem.—It is the duty of a next friend (now guardian ad litem) to represent the infant, see that the witnesses are present at the trial of the infant's case, and to do all things which are required to secure a judgment favorable to the infant. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964), decided under former § 1-64.

Where an infant has a general guardian, such guardian is the only one who can defend on behalf of the infant, and defense by a subsequently appointed guardian ad litem is a nullity. Narron v. Musgrave, 236 N.C. 388, 73 S.E.2d 6 (1952), decided under former § 1-65.1.

Failure to Plead Infancy of Petitioner as Defense.—Where a minor petitioned for a writ of habeas corpus under § 17-39 in her own name, and not by next friend (now guardian ad litem), and the record on appeal failed to show that the respondent pleaded the infancy of the petitioner as a defense, it was considered as waived. In re Custody of Allen, 238 N.C. 367, 77 S.E.2d 907 (1953), decided under former § 1-64.

Inquisition to Determine Sanity of Defendant Not Required.—The court is under duty to appoint a guardian ad litem for a defendant who is non compos mentis and who has no general guardian, and an inquisition to determine the sanity of the defendant is not a condition precedent to such appointment. Moore v. Lewis, 250 N.C. 77, 108 S.E.2d 26 (1959), decided under former § 1-65.1.

Order Appealable.—An order appointing a next friend (now guardian ad litem) for plaintiff is an order affecting a substantial right from which plantiff may appeal. Hagins v. Redevelopment Comm'n, 1 N.C. App. 40, 159 S.E.2d 584 (1968), decided under former § 1-64.

Whether a new trial will be ordered for failure to appoint a guardian ad litem will depend upon the circumstances of the particular case as to whether the infant or infants have been fully protected in their rights and property, and a new trial will not be granted for mere technical error which could have affected the result, but only for error which is prejudicial or harmful. Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962), decided under former § 1-65.1.

Consent to Judgment or Compromise.—In the case of infant parties, the guardian ad litem or guardian cannot consent to a judgment or compromise without the investigation and approval by the court. State ex rel. Hagins v. Phipps, 1 N.C. App. 63, 159 S.E.2d 601 (1968), decided under former § 1-64.

Satisfaction of Judgment in Favor of Infant. — Under the statutes of this State, only the clerk or the legal guardian of an infant has authority to receive payment and satisfy a judgment rendered in favor of an infant, and the defendant pays the judgment to the clerk of the superior court, who holds the funds until the minor becomes twenty-one or until a general guardian is appointed for him, unless the sum is $1,000.00 or less, when he may disburse it himself under the terms of § 2-53. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964), decided under former § 1-64.

Judgment against Infant Held Void.—Where an infant is not served but his guardian ad litem appears and answers but interposes no real defense, and the court enters judgment on the day of the appointment of the guardian ad litem, the judgment against the infant is void for want of jurisdiction. Narron v. Musgrave, 236 N.C. 388, 73 S.E.2d 6 (1952), decided under former § 1-65.1.

Rule 18. Joinder of claims and remedies.

(a) *Joinder of claims.*—A party asserting a claim for relief as an original claim, counterclaim, cross claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party.

(b) *Joinder of remedies; fraudulent conveyances.*—Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money. (1967, c. 954, s. 1; 1969, c. 895, s. 7.)

Comment.—This is an exact tracking of the federal rule. This reflects the view that the joinder conceptions expressed in this rule are much preferable to the code approach as previously incorporated essentially in former §§ 1-123, 1-68 and 1-69.

The first sentence of section (a) starts with the simplest possible situation by stating the basic rule for permissive joinder of claims as between just two parties. This rule is simply for potentially unlimited joinder, without regard to number and nature. If this be thought to open the door to vast confusion by encouraging an unfettered joinder of numerous completely unrelated claims, two things should be remembered. First, as a practical matter, human affairs do not often contrive to give many legal claims to any particular individual against another particular individual at times close enough together to raise even the possibility of their joinder in a single action. Furthermore, to the extent multiple claims do arise close enough in point of time to raise the joinder possibility, they are extremely likely to arise out of the same basic historical occurrences or transactions, thus presenting fair ground for inclusion in one lawsuit. Secondly, if, however, too numerous claims are allowed to be joined in the pleadings in a particular case, this does not mean that they must therefore be tried in the same case. Both Rules 20 (b) and 42 (b) contain express mandates to sever claims prior to trial for separate trial where orderliness and fairness require this.

The second sentence posits the more

complicated situation of multiple parties and multiple claims, and reiterates the basic rule of unlimited joinder of claims in this situation but with the proviso that the limitations on permissive party joinder (as expressed in Rules 19, 20, and 22) are to be observed. As indicated in the General Comment to this bloc of rules, this is a much more preferable way in logic to handle the difficult problem of interrelating limitations on multiple claim and multiple party joinder than is the code way. The party joinder rules impose quite realistic and sufficient restrictions on unfettered joinder of claims here. For where both multiple claims and multiple parties are involved, two unifying factors in respect of the various parties vis-a-vis the various claims must exist to allow the claims to be joined, i.e., (1) all the claims must arise out of the same aggregation of historical facts (same "transaction or occurrence, etc."), and (2) there must be in respect of all parties some common question of law or fact necessarily to be determined in the action. This is a much more easily understandable and applicable restriction than is the vague "all causes must affect all parties" restriction which underlies all other tests for permissive joinder of claims under the former code approach. It also gets more truly at the valid limiting consideration which should control the maximum size, i.e., the avoidance of too numerous historically unrelated issues in a single action wherein not all the parties are interested in the resolution of all the issues.

The third sentence quite logically makes these rules for permissive joinder of claims and of parties and claims applicable to crossclaims and third-party claims when the integral requirements for prosecuting such claims are met.

By contrast with this logically conceived and well-stated directive for permissive joinder of claims in both the single and multiple party situations, the code approach in former § 1-123 was poorly conceived and has led to logically absurd and unjustifiable results. Thus, for example, in a single party context under this statute, A may sue B in one action for breach of two entirely different contracts, since both causes fall within one of the listed categories of joinable claims, Lyon v. Atlantic C.L.R.R., 165 N.C. 143, 81 S.E. 1 (1914); but A may not in one action sue B, his employer, for (1) negligent injury, and (2) wrongful discharge from employment when A refuses to sign a release as to the negligence claim, because the two causes do not fall within any of the listed categories, not even the "same transaction" category. Pressley v. Great Atl. & Pac. Tea Co., 226 N.C. 518, 39 S.E.2d 382 (1946). In the multiple party context the "joker provision" that notwithstanding claims may be otherwise joinable, they may not be joined if all of them do not affect all parties, has given rise to quite unpredictable results from case to case. For example, in Branch Banking & Trust Co. v. Pierce, 195 N.C. 717, 143 S.E. 524 (1928), against the contention that all causes did not affect all parties, plaintiff was allowed to join several claims against various officers and directors of a corporation, alleging mismanagement notwithstanding the alleged several acts extended over a period of years during all of which it did not appear all the defendants were serving; while in Gattis v. Kilgo, 125 N.C. 133, 34 S.E. 246 (1899), A was not allowed to join a cause of action against B for slander with a cause against B and three others for subsequent publication of the same slander, because all causes did not affect all parties. Legitimate considerations of trial convenience were frequently not served by this code directive. Thus, most typically, while it will prevent A and B from joining in a negligence case against C from injuries received by the same actionable negligence of C, the courts quite frequently consolidate for trial the separate nonjoinable claims of A and B for trial convenience.

Section (b) establishes a rule of permissive joinder, whose obvious import is to avoid the circuity of action necessitated by successive actions if such joinder were not expressly authorized by rule. The effect of this rule is to codify North Carolina case law in respect of the money claim, fraudulent conveyance joinder. Dawson Bank v. Harris, 84 N.C. 206 (1881) (establishing rule consistently followed since).

Editor's Note. — The 1969 amendment rewrote section (a).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

Suit in Personam and in Rem Combined. —The holder of a note secured by a deed of trust may sue the makers in personam for the debt and may sue in rem to subject the mortgaged property to the payment of the note, and may combine the two remedies in one civil action. Watson v. Carr, 4 N.C. App. 287, 166 S.E.2d 503 (1969), decided under former § 1-123.

Cited in Robertson v. Bankers & Tel. Employers Ins. Co., 1 N.C. App. 122, 160 S.E.2d 115 (1968).

Rule 19. Necessary joinder of parties.

(a) *Necessary joinder.*—Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the complaint; provided, however, in all cases of joint contracts, a claim may be asserted against all or any number of the persons making such contracts.

(b) *Joinder of parties not united in interest.*—The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.

(c) *Joinder of parties not united in interest—names of omitted persons and reasons for nonjoinder to be pleaded.*—In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted. (1967, c. 954, s. 1.)

Cross Reference.—For statutory provision similar to the proviso in section (a) of this rule, see § 1-72.

Comment. — This rule deals with the problem of the minimum allowable size of a lawsuit, from the standpoint of parties required to be joined in order to proceed to trial. There is no compulsory joinder of causes of action, separately conceived, as noted in the General Comments to this bloc of joinder rules.

As framed, this rule is essentially a recodification of existing and former North Carolina statutes. Specifically, section (a), down to the proviso, is substantially a rewrite of the first sentence of former § 1-70. The introductory phrase, "subject to the provisions of Rule 23," makes the compulsory joinder directive subject to the class-action exception, which is now separately treated in Rule 23. The proviso is substantially a recodification of § 1-72 to carry forward the option to join or not join joint contract obligors plainly stated therein. Section (b) is substantially a tracking of the first sentence of former § 1-73, to express the general notion of "necessary party" based not on substantive jointness of claim but on the more general consideration of fairness and judicial economy of effort developed in the General Comments to this bloc of joinder rules. Adoption of this language involves rejection of the more sophisticated federal rules approach which posits the more refined categories of "indispensable" and "conditionally necessary parties." The code language is retained in the belief that roughly the same functional results are reached under its directive and the case law evolution under it of "proper" and "necessary" parties, and that no sufficiently good purpose would be served by introducing the new and more refined concepts and terminology to justify the risk of confusion from their introduction.

Section (c) is a direct counterpart of federal Rule 19 (c). It is adopted because it forces explanation in the first instance of that which may be otherwise extracted by separate and time consuming later motion to require joinder. As such it should save waste motion and time, if there is an adequate reason, such as unavailability of a party, to explain his nonjoinder in the first place.

Editor's Note.—The cases cited in this note were decided under former §§ 1-70, 1-73 and 1-123.

For case law survey as to alternative joinder of parties, see 45 N.C.L. Rev. 838 (1967).

Section (b) is mandatory. Simon v. Raleigh City Bd. of Educ., 258 N.C. 381, 128 S.E.2d 785 (1963).

Section (b) of this rule makes it mandatory when a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in. They are necessary parties. Maryland Cas. Co. v. Hall, 2 N.C. App. 198, 162 S.E.2d 691 (1968).

Section (b) makes it mandatory "when a complete determination of the controversy cannot be made without the presence of other parties" for these others to be made parties to the action. They are necessary parties. Overton v. Tarkington, 249 N.C. 340, 106 S.E.2d 717 (1959).

It Contemplates Only Making of Necessary Parties.—See Simon v. Raleigh City Bd. of Educ., 258 N.C. 381, 128 S.E.2d 785 (1963).

Necessary Parties. — When a complete determination of the matter cannot be had without the presence of other parties, the court must cause them to be brought in. W.F. Kornegay & Co. v. Farmers & Merchants' Steamboat Co., 107 N.C. 115, 12 S.E. 123 (1890); Maxwell v. Barringer, 110 N.C. 76, 14 S.E. 516 (1892); Parton v. Allison, 111 N.C. 429, 16 S.E. 415 (1892); Burnett v. Lyman, 141 N.C. 500, 54 S.E. 412 (1906); McKeel v. Holloman, 163 N.C. 132, 79 S.E. 445 (1913); Barbee v. Cannady, 191 N.C. 529, 132 S.E. 572 (1926); Fry v. Pomona Mills, 206 N.C. 768, 175 S.E. 156 (1934).

Necessary or indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in. Pickelsimer v. Pickelsimer, 255 N.C. 408, 121 S.E.2d 586 (1961).

A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party. Garrett v. Rose, 236 N.C. 299, 72 S.E.2d 843 (1952); Manning v. Hart, 255 N.C. 368, 121 S.E.2d 721 (1961); Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968); Maryland Cas. Co. v. Hall, 2 N.C. App. 198, 162 S.E.2d 691 (1968).

When a complete determination of the controversy cannot be made without the presence of a party, the court must cause it to be brought in because such party is a necessary party and has an absolute right to intervene in a pending action. Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968).

Proper Parties. — The term "proper party" to an action or proceeding means a party who has an interest in the controversy or subject matter which is separable from the interest of the other parties before the court, so that it may, but will not necessarily, be affected by a decree or judgment which does complete justice between the other parties. Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968).

Defect of Parties.—A defect of parties occurs when there has been a failure to join either a plaintiff or a defendant whose presence in the suit is necessary to give the court jurisdiction and authority to decide the controversy. When such a defect appears from the complaint itself, it is a ground for demurrer and a fatal defect unless the necessary party is brought in under this section. Miller v. Jones, 268 N.C. 568, 151 S.E.2d 23 (1966).

Several parties may have a cause of action which arises out of the same motor vehicle collision, but that does not mean necessarily that all of them are required to litigate their respective rights or causes of action in one and the same action. Manning v. Hart, 255 N.C. 368, 121 S.E.2d 721 (1961); Maryland Cas. Co. v. Hall, 2 N.C. App. 198, 162 S.E.2d 691 (1968).

Action by Owner against Contractor.—Where an owner sued his contractor for breach of contract and the contractor sought to have his subcontractor joined as a party defendant, it was held that this section was inapplicable. Gaither Corp. v. Skinner, 238 N.C. 254, 77 S.E.2d 659 (1953).

Claims for Wages.—The claim for unpaid wages due an employee can be joined in one action with similar claims assigned to that plaintiff employee, and if the claims are assigned to joint assignees, all assignees must be parties and recover in their joint right. Morton v. Thornton, 257 N.C. 259, 125 S.E.2d 464 (1962).

Counterclaim.—If, prior to the institution of plaintiff's action, the defendant could have sued either the plaintiff, the other party, or both, there is no reason why the defendant is required to join the other party as a codefendant to its cause of action on a counterclaim against plaintiff. Bullard v. Berry Coal & Oil Co., 254 N.C. 756, 119 S.E.2d 910 (1961).

Ejectment.—Where in an action of ejectment the controversy involved is whether the plaintiff owns the land in fee simple absolute, or whether the defendant owns the land in fee simple, subject to a charge payable in equal shares to the plaintiff and the personal representatives of six decedents, it is manifest that the personal representatives of these six decedents are so vitally interested in this controversy that a valid judgment cannot be rendered in this action completely and finally determining the controversy without their presence as parties. This being true, they are necessary parties to the action. Garrett v. Rose, 236 N.C. 299, 72 S.E.2d 843 (1952).

Foreclosure.—In an action for foreclosure, the trustee in the deed of trust is a necessary and indispensable party. Watson v. Carr, 4 N.C. App. 287, 166 S.E.2d 503 (1969).

Where a note secured by a deed of trust

is payable to joint payees, they must join as parties in an action to foreclose the deed of trust, and when one of them refuses to join as a plaintiff, such payee is properly joined as a defendant. Underwood v. Otwell, 269 N.C. 571, 153 S.E.2d 40 (1967).

Joint Holders of Bill or Note.—Where a bill or note is made payable to several persons, or is endorsed or assigned to several, they are joint holders and must sue jointly as such. Underwood v. Otwell, 269 N.C. 571, 153 S.E.2d 40 (1967).

Cited in Robertson v. Bankers & Tel. Employers Ins. Co., 1 N.C. App. 122, 160 S.E.2d 115 (1968).

Rule 20. Permissive joinder of parties.

(a) *Permissive joinder.*—All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and of any question of law or fact common to all parties will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) *Separate trial.*—The court shall make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and shall order separate trials or make other orders to prevent delay or prejudice. (1967, c. 954, s. 1.)

Comment.—This is an exact counterpart of federal Rule 20, and was proposed because it was felt, as developed in the General Comment to this bloc of rules, that the federal approach to permissive joinder is a much more serviceable one than was the code approach.

As pointed out in that Comment, the only limitations in respect of joinder in the federal approach are those related literally to party joinder. These limitations contemplate both single claim actions and multiple claim actions. In the multiple party-multiple claim action they are related by reference as limitations on claim joinder, as indicated in the Comment to Rule 18.

The rule is designed generally to express the notion that the limiting factors which control maximum lawsuit size in either single claim or multiple claim (by referring party joinder limitations to the claim joinder rule) litigation are (1) that the right to relief asserted by or against each party joined in the action should arise generally out of the same general aggregation of historical facts, and (2) furthermore, that in respect of all parties joined there must be involved for necessary determination in the lawsuit as structured a common question of law or fact. Beyond these limitations designed to keep the issues within bounds of fairness to parties and orderliness of handling, there is no requirement that every party must be affected by, or interested in, all the relief sought in the total action. And it is made plain, in furtherance of this notion, that the judgment entered in law suits involving multiple similarly aligned parties may be conformed to the possibility that not all parties are interested in all the relief to be given.

Section (b) provides the final safeguard against dangerous oversize and complexity through joinder by laying down a specific mandate for severance or such other orders as will protect parties in multiple party cases from unfairness resulting from their lack of interest or involvement in every facet of the case as permitted to be structured by the joinder rules.

Editor's Note.—The cases cited in this note were decided under former §§ 1-68, 1-69, 1-70 and 1-73.

For article on permissive joinder of parties and causes, see 34 N.C.L. Rev. 405 (1956). For note on alternative joinder of defendants, see 42 N.C.L. Rev. 242 (1963).

For case law survey as to alternative joinder of parties, see 45 N.C.L. Rev. 838 (1967).

Basic Concept.—The code of civil procedure was bottomed on the basic concept that a court ought to bring before it as parties in a particular action all persons who might have interests either by way of rights or by way of liabilities in the subject matter of the action so that a single judgment might be rendered effectually determining all such rights and liabilities for the protection of all concerned. Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952).

There May Be Several Plaintiffs Whose Interests Are Not Identical. — The fact that the interests of plaintiffs are legally severable, or not common or identical, is no bar to their joinder where they have a common interest in the subject of the action and the relief sought. Wilson v. Horton Motor Lines, 207 N.C. 263, 176 S.E. 750 (1934); Peed v. Burleson's Inc., 242 N.C. 628, 89 S.E.2d 256 (1955).

But Their Interests Must Be Consistent. —While it is not necessary that all parties plaintiff have the identity of interest required by the common law, it is necessary that the interests of parties plaintiff be consistent. Burton v. Reidsville, 240 N.C. 577, 83 S.E.2d 651 (1954).

The object of former § 1-68 was to permit all persons, who came within its terms, to unite as parties plaintiff, so that a single judgment might be rendered completely determining the controversy for the protection of all concerned. Hall v. DeWeld Mica Corp., 244 N.C. 182, 93 S.E.2d 56 (1956); Whitehead v. Margel, 220 F. Supp. 933 (W.D.N.C. 1963).

Proper parties are those whose interest might be affected by a decree, but the court can proceed to adjudicate the rights of others without necessarily affecting them, and whether they shall be brought in or not is within the discretion of the court. Pickelsimer v. Pickelsimer, 255 N.C. 408, 121 S.E.2d 586 (1961).

Two or more plaintiffs representing opposing interests with reference to the main purpose of the action may not be joined. Burton v. City of Reidsville, 240 N.C. 577, 83 S.E.2d 651 (1954).

One Cause of Action.—This section permits the joinder of defendants in the alternative where there is but one cause of action. For instance, if A wishes to sue B, the driver of a motor vehicle, and his employer for B's negligence but is uncertain whether C or D was the principal, he may join them both as defendants in the alternative. Conger v. Travelers Ins. Co., 260 N.C. 112, 131 S.E.2d 889 (1963).

Where defendant is liable to one of two parties in the alternative, so that if he is liable to one he is not liable to the other, and defendant is not sure to which of the parties liability obtains, he is entitled to join both as plaintiffs. American Air Filter Co. v. Robb, 267 N.C. 583, 148 S.E.2d 580 (1966).

Where the wrongful acts of two or more persons concur in producing a single injury and with or without concert between them, they may be treated as joint tortfeasors and, as a rule, sued separately or together at the election of plaintiffs. Chumley v. Great Atl. & Pac. Tea Co., 191 F. Supp. 254 (M.D.N.C. 1961), citing Raulf v. Elizabeth City Light & Power Co., 176 N.C. 691, 97 S.E. 236 (1918).

In an action by a partner for the dissolution of the partnership and for the proper application of the partnership assets, plaintiff partner may join as a defendant the transferee of the defendant partner upon allegation that the transfer was wrongful, in order to have the entire controversy settled in one action and plaintiff is not compelled first to bring an action to establish the fact of the existence of the partnership and then another action for an accounting. Bright v. Williams, 245 N.C. 648, 97 S.E.2d 247 (1957).

Holder of Note Not Named in Deed of Trust.—Where the note which a deed of trust purports to secure is payable to bearer, the plaintiff alleges it is "a false and fictitious paper writing" and that the identity of the supposed bearer "remains unknown to plaintiff," the trustee in the deed of trust which purports to secure the payment of such note is a party to the action and has participated actively in its defense, whatever may be the siuation where the holder of the indebtedness is named in the deed of trust and known, the holder of the alleged note cannot be deemed a necessary party to the action to set aside the deed of trust which purports to secure it Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

Joinder of Insured in Insurer's Action to Enforce Subrogation. — See Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952), commented on in 31 N.C.L. Rev. 224 (1953).

Insurance Company That Has Paid Part of Plaintiff's Loss. — An insurance company which pays an insured for a part of the loss is a proper party to an action brought by the insured against a tortfeasor to recover the total amount of the loss, and may be brought into the action at the instance of the insured or the tortfeasor either in the capacity of an additional plaintiff or in the capacity of an additional defendant. Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952), commented on in 31 N.C.L. Rev. 224 (1953). See Jackson v. Baggett, 237 N.C. 554, 75 S.E.2d 532 (1953).

Husband and Wife as Plaintiffs.—Where plaintiffs, husband and wife, alleged that they own their home in which they live and that defendant's nearby mining operations have resulted in damage to it, the allegation that they own their home is sufficient to show that both have an interest in the property, and therefore both are properly joined as plaintiffs. Hall v. DeWeld Mica Corp., 244 N.C. 182, 93 S.E.2d 56 (1956).

Husbands Sued on Trade Acceptances and Their Wives as Guarantors. — There was no misjoinder of parties and causes of action where the plaintiff in the same proceeding sued husbands on trade acceptances, and sued their wives on guaranties executed to secure such trade acceptances. Arcady Farms Co. v. Wallace, 242 N.C. 686, 89 S.E.2d 413 (1955).

Joinder of Husband and Wife in Action for Negligent Use of Property Held as Tenants by Entirety.—A husband and wife, holding property as tenants by the entirety, may properly be named defendants and held jointly liable for injuries resulting from the negligent use of the property, unless there is evidence shown at the trial that the husband exercised such exclusive control of the property as to exonerate the wife from liability. Whitehead v. Margel, 220 F. Supp. 933 (W.D.N.C. 1963).

Cited in Robertson v. Bankers & Tel. Employers Ins. Co., 1 N.C. App. 122, 160 S.E.2d 115 (1968).

Rule 21. Procedure upon misjoinder and nonjoinder.

Neither misjoinder of parties nor misjoinder of parties and claims is ground for dismissal of an action; but on such terms as are just parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action. Any claim against a party may be severed and proceeded with separately. (1967, c. 954, s. 1.)

Comment.—This is an exact counterpart to federal Rule 21, with the addition of the phrase "nor misjoinder of parties and claims" appearing in the first sentence. The general purpose of the rule is clearly to solidify the basic notion under the federal approach that faulty structuring of a case in terms of joinder of improper parties should not give rise to any drastic interruption of its normal progress to trial. Rather, the safeguard of restructuring without interruption, through severance or dropping of parties, without dismissal, is provided as an adequate protection against the evils of proceeding to trial in an overly-complex structure. The phrase referring to misjoinder of parties and causes, while probably not strictly necessary from the logical standpoint, is inserted because of the developed North Carolina case law rule for dismissal rather than severance where there is "misjoinder of both parties and causes." See Brandis, *Permissive Joinder of Parties and Causes in North Carolina*, 25 N.C.L. Rev. 1, pp. 49-53 (1946).

Cited in Robertson v. Bankers & Tel. Employers Ins. Co., 1 N.C. App. 122, 160 S.E.2d 115 (1968).

Rule 22. Interpleader.

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims expose or may expose the plaintiff to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of crossclaim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20. (1967, c. 954, s. 1.)

Comment.—This rule makes clear that a liberalized use of interpleader is to be permitted. In particular, Pomeroy's four limitations on the use of interpleader are specifically repudiated. While the North Carolina court has not yet turned its back on these limitations, it has indicated some impatience with them. See Simon v. Raleigh City Bd. of Educ., 258 N.C. 381, 128 S.E.2d 785 (1963).

Rule 23. Class actions.

(a) *Representation.*—If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.

(b) *Secondary action by shareholders.*—In an action brought to enforce a secondary right on the part of one or more shareholders or members of a corporation or an unincorporated association because the corporation or association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath.

(c) *Dismissal or compromise.*—A class action shall not be dismissed or compromised without the approval of the judge. In an action under this rule, notice of a proposed dismissal or compromise shall be given to all members of the class in such manner as the judge directs. (1967, c. 954, s. 1.)

Comment.—*Section (a).* — In respect to class actions, the Commission adheres rather closely to the statutory provisions in North Carolina. See former § 1-70. It will be seen that three requirements are present. First, there must be a "class." Second, there must be such numerosity as to make impracticable the joinder of all members of the class. Third, there must be an assurance of adequacy of representation. This last requirement, while not contained in the statute, is surely necessary if the class action is to have any binding effect on absentees. See Hansberry v. Lee, 311 U.S. 32, 61 Sup. Ct. 115, 85 L. Ed. 22, 132 A.L.R. 741 (1940).

Section (b).—The Commission has not followed the federal rule in this section in its requirements that a shareholder must allege that he was a shareholder at the time of the transaction of which he complains. It was the Commission's thought that such a requirement may well deprive shareholders of any remedy when the corporation has suffered grievous injury. The Commission has also chosen not to follow the federal rule in its requirement of allegations in respect to the shareholder's efforts to persuade the managing directors to take remedial action. The Commission does not, however, take the positive approach of saying such allegations are unnecessary. Rule 8 governing what a complaint must contain is a sufficient guide in this matter.

Section (c). — This section seems obviously desirable in the protection that it affords absentees.

Editor's Note.—The cases cited in this note were decided under former § 1-70.

For note on capacity of unincorporated associations to sue and be sued, see 30 N.C.L. Rev. 465 (1952).

Federal Counterpart. — Former § 1-70 had its counterpart in Rule 23a of the Federal Civil Rules of Procedure. Cocke v. Duke Univ., 260 N.C. 1, 131 S.E.2d 909 (1963).

Provisions merely provide a ready means for dispatch of business. Cocke v. Duke Univ., 260 N.C. 1, 131 S.E.2d 909 (1963).

Community of Interest. — Plaintiff is authorized to bring an action in behalf of himself and other owners of lots in a cemetery who by reason of similar representations were induced to buy lots. Such lot owners have a community of interest. Mills v. Carolina Cemetery Park Corp., 242 N.C. 20, 86 S.E.2d 893 (1955).

Plaintiff Must Show Authority to Join Causes of Action in Favor of Other Parties Similarly Situated.—A party plaintiff may not join with his own cause of action against a defendant causes of action against the same defendant in favor of other parties similarly situated, in the absence of a showing of authority to bring such actions in their behalf. Nodine v. Goodyear Mtg. Corp., 260 N.C. 302, 132 S.E.2d 631 (1963).

Potential Beneficiaries of Trust.—Where the potential beneficiaries of a trust were so numerous that it was practically impossible to bring them all before the court in an action seeking modification of the trust, a beneficiary of each class could be made a party and represent the class. The court's jurisdiction over the trust was not dependent on acquiring personal jurisdiction over every potential beneficiary. Cocke v. Duke Univ., 260 N.C. 1, 131 S.E.2d 909 (1963).

Rule 24. Intervention.

(a) *Intervention of right.*—Upon timely application anyone shall be permitted to intervene in an action:

(1) When a statute confers an unconditional right to intervene; or

(2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive intervention.*—Upon timely application anyone may be permitted to intervene in an action.

(1) When a statute confers a conditional right to intervene; or

(2) When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or State governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, such officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) *Procedure.*—A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene, except when the statute prescribes a different procedure. (1967, c. 954, s. 1.)

Comment. — *Section (a).* — This section, providing for intervention as of right, while closely following the federal rule, spells out a practice much like that already achieved in North Carolina. Intervention now is of right in claim and delivery and in attachment by virtue of § 1-440.43 and § 1-482. In respect to subsection (2), it will be noted that the harm to the intervenor's interest is to be considered from a "practical" standpoint, rather than technically. In other words, the intervenor need not be threatened with being bound in a strict res judicata sense. Further, it should be noted that adequate representation for the proposed intervenor is not limited to purely formal representation. But a present party may, in appropriate circumstances, be relied on to protect the intervenor's interest even though there is no formal relationship. See Annot., 84 ALR2d 1412 (1962).

It will be observed that in any case, the application to intervene must be "timely." What will be "timely" will depend on the circumstances of the case.

Section (b). — This section perhaps establishes a broader base for permissive intervention than North Carolina now has but the Commission believes that the flexibility it makes possible to be highly desirable and the Commission is confident that the stated guide to the court as to what it shall consider in deciding whether or not to permit intervention will insure adequate protection for the original parties.

Section (c).—This section with its simple statement of the required procedure should be useful.

Editor's Note.—The cases cited in this note were decided under former §§ 1-70 and 1-73.

Persons Entitled to Intervene.—Before a third party will be permitted to become a party defendant in a pending action, he must show that he has some legal interest in the subject matter of the litigation. His interest must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment, and it must be involved in the subject matter of the action. One whose interest in the matter in litigation is not a direct or substantial interest, but is an indirect, inconsequential, or a contingent one cannot claim the right to defend. Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968).

A person who is a necessary party has an absolute right to intervene in a pending action, and the court commits error when it refuses to permit him to exercise such right. Garrett v. Rose, 236 N.C. 299, 72 S.E.2d 843 (1952).

Refusal to permit a necessary party to intervene is error. Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968).

Discretion of Court. — Ordinarily it is within the discretion of the court to permit proper parties to intervene. Childers v. Powell, 243 N.C. 711, 92 S.E.2d 65 (1956); Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968).

Where No Controversy between Parties. — Where in an action to establish and enforce a lien for labor on defendants' land, the defendants filed no answer, persons who claimed to hold a mortgage on the land were not entitled to intervene, since there was no controversy between plaintiff and defendant. Childers v. Powell, 243 N.C. 711, 92 S.E.2d 65 (1956).

Intervening Plaintiffs Whose Interests Are Adverse to Original Plaintiffs. — In an action filed by taxpayers to enjoin city from destroying low cost rental units belonging to city, intervenors were not entitled to come into case as parties plaintiff where their pleadings expressly denied all material allegations of the complaint and attempted to assert claims wholly antagonistic to those alleged by the plaintiffs. Burton v. City of Reidsville, 240 N.C. 577, 83 S.E.2d 651 (1954).

Rule 25. Substitution of parties upon death, incompetency or transfer of interest; abatement.

(a) *Death.*—No action abates by reason of the death of a party if the cause of action survives. In such case, the court, on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may order the substitution of said party's personal representative or successor in interest and allow the action to be continued by or against the substituted party.

(b) *Insanity or incompetency.*—No action abates by reason of the incompetency or insanity of a party. If such incompetency or insanity is adjudicated, the court, on motion at any time within one year after such adjudication, or afterwards on a supplemental complaint, may order that said party be represented by his general guardian or trustee or a guardian ad litem, and, allow the action to be continued. If there is no adjudication, any party may suggest such incompetency or insanity to the court and it shall enter such order in respect thereto as justice may require.

(c) *Abatement ordered unless action continued.*—At any time after the death, insanity or incompetency of a party, the court in which an action is pending, upon notice to such person as it directs and upon motion of any party aggrieved, may order that the action be abated, unless it is continued by the proper parties, within a time to be fixed by the court, not less than six nor more than 12 months from the granting of the order.

(d) *Transfer of interest.*—In case of any transfer of interest other than by death, the action shall be continued in the name of the original party; but, upon motion of any party, the court may allow the person to whom the transfer is made to be joined with the original party.

(e) *Death of receiver of corporation.*—No action against a receiver of a corporation abates by reason of his death, but, upon suggestion of the facts on the record, it continues against his successor or against the corporation in case a new receiver is not appointed and such successor or the corporation is automatically substituted as a party.

(f) *Public officers; death or separation from office.*—

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

(g) *No abatement after verdict.*—After a verdict is rendered in any action, the action does not abate by reason of the death of a party, whether or not the cause of action upon which it is based is a type which survives. (1967, c. 954, s. 1.)

Comment. — Former § 1-74 and federal Rule 25 were generally comparable in providing for no automatic abatement of actions upon death, disability or transfer of interest of parties, but, instead, for a right to continue the action by or against substituted parties. The most important difference was in their respective ways of finally cutting off the right to continue. The federal rule allows two years within which parties may be substituted so as to continue the action, then for automatic dismissal if this has not been done within the period. Former § 1-74 allowed substitution and continuance on mere motion for one year after death or disability, and afterwards on supplemental complaint. No automatic dismissal was provided, but there was further provision that a party might be forced by the opposite party to either get substitution for continuation or suffer dismissal within a time specified by the court. Furthermore, former § 1-75 in a very awkward and questionable way imposed a duty on the adverse party to suggest to the court the death or disability of his opponent, and then a duty on the clerk to notify the proper representative to come in and file pleadings.

On balance, it was felt that the State procedure had served North Carolina well enough in this area and that accordingly the form of former § 1-74 should be followed. There has been an attempt, however, to dress the format up somewhat, using catchlines for separate sections and cleaning up some of the incomplete and ambiguous language.

Furthermore, there has been added section (f), tracking the language of federal Rule 25 (d), relating to death and separation of public officers. There is no comparable provision in the current law.

Finally, former § 1-75 was omitted entirely, on the basis that it was ambiguous, and that in apparently requiring new pleadings by substituted parties, it was not desirable. Its requirements have in fact been overlooked by the North Carolina court which has allowed substitution and continuation of actions without compliance with its provisions. See Alexander v. Patton, 90 N.C. 557 (1884).

The only danger in this scheme is that a party may try to lie back until a successor in interest has lost all chance of proceeding successfully and then coming in with a supplemental complaint and trying to resurrect the successor to force a continuation within time specified under section (c). But the court has prevented plaintiffs from so acting. See Sawyer v. Cowell, 241 N.C. 681, 86 S.E.2d 431 (1955).

Editor's Note.—The cases cited in this note were decided under former § 1-74.

Common-Law Rule Changed.—

The rule of the common law that a personal right of action dies with the person has been changed. Paschal v. Autry, 256 N.C. 166, 123 S.E.2d 569 (1962).

Decedent's Cause of Action Can Be Prosecuted Only by Personal Representative.—A decedent's cause or right of action surviving his death can be continued and prosecuted only by his personal representative. Neal v. Associates Disct. Corp., 260 N.C. 771, 133 S.E.2d 699 (1963).

When Action Abates.—An action which survives disability or death does not abate until a judgment of the court is entered to that effect. Sawyer v. Cowell, 241 N.C. 681, 86 S.E.2d 431 (1955).

The power of the court to allow an action which survives the death of defendant to be continued against defendant's personal representative of successor in interest may not be invoked by a plaintiff who has kept his action in a semidormant condition for a number of years and then called defendant's heir into court after the heir, by elapse of time, is unable to make good his defense or that defense which the ancestor might have made. Sawyer v. Cowell, 241 N.C. 681, 86 S.E.2d 431 (1955).

Action for Wrongful Cutting and Removal of Timber.—If a cause of action for damages for the wrongful cutting and removal of timber from realty belonging to the deceased, accrued, in whole or in part, during his lifetime, the action for damages survives to his executors, and must be brought by his executors rather than by his heirs or devisees. However, if such an injury to the realty was committed after his death, the right of action belongs to his heirs or devisees. Paschal v. Autry, 256 N.C. 166, 123 S.E.2d 569 (1962).

ARTICLE 5.

Depositions and Discovery.

Rule 26. Depositions in a pending action.

(a) *When depositions may be taken.*—After the commencement of an action and before a final judgment, any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 30 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison or of a patient in an institution or hospital for the mentally ill, mentally handicapped, or epileptic, or any other hospital, home, or institution, may be taken only by leave of court on such terms as the court prescribes.

(b) *Scope of examination.*—Unless otherwise ordered by the judge as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it ground for objection that the examining party has knowledge of the matters as to which testimony is sought. But the deponent shall not be required to produce or submit for inspection any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless the judge otherwise orders on the ground that a denial of production or inspection will result in an injustice or undue hardship; but, in no event shall the deponent be required to produce or submit for inspection any part of a writing which reflects an attorney's mental impressions, conclusions, opinions or legal theories, or except as provided in Rule 35, the conclusions of an expert.

(c) *Examination and cross-examination.*—Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 43 (b).

(d) *Use of depositions.*—Any part or all of a deposition, so far as admissible under the rules of evidence, may be used at the trial or upon the hearing of a motion or an interlocutory proceeding or upon a hearing before a referee, against any party who was present or represented at the taking of the deposition or who had due notice thereof, as follows:

(1) When the deponent is a party adverse to the party offering the deposition in evidence or is a person who at the time of taking the deposition was an officer, director or managing agent of a public or private corporation, partnership, or association which is a party adverse to the party offering the deposition in evidence, the deposition may be used for any purpose, whether or not deponent testifies at the trial or hearing.

(2) When the deponent testifies at the trial or hearing, the deposition may be used

  a. By any party adverse to the party calling deponent as a witness, for the purpose of impeaching or contradicting the testimony of deponent as a witness, or as substantive evidence, and

  b. By the party calling deponent as a witness, as substantive evidence of such facts stated in the deposition as are in conflict with or inconsistent with the testimony of deponent as a witness.

(3) Except as provided in subsections (1) and (2) of this section of this rule, a deposition may be used only if the court finds: (i) That the deponent is dead; or (ii) that the deponent is at a greater distance than 75 miles from the place of trial or hearing, unless it appears that the absence of the deponent was procured by the party offering the deposition; or (iii) that the deponent is a physician who either resides or maintains his office outside the county where the trial or hearing

is held; or (iv) that the deponent is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (v) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (vi) upon motion and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. If the court makes any such finding, the deposition may be used by any party for any purpose, whether or not deponent is a party.

(4) If only a part of a deposition is offered in evidence by a party, any party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other part.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of this State or of any other state or of the United States has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the later action as if originally taken therefor.

(e) *Effect of taking or using depositions.*—A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in section (d) (1). At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party. (1967, c. 954, s. 1.)

Comment.—*Section (a).* — This section gives a broad right of discovery to any party to take the testimony of any person, including a party, by oral deposition, pursuant to Rule 30, or by written interrogatories, pursuant to Rule 31, for the purpose of discovery or for use as evidence or for both purposes. Under prior practice the depositions of persons might be taken and perpetuated by deposition, and under former § 1-568.1 et seq. the deposition of a party might be taken for the purpose of discovery or for use as evidence or for both purposes.

Under this rule the necessity of obtaining court authorization is avoided, except leave of court must be obtained when plaintiff seeks to take a deposition within 30 days after the commencement of the action. Under prior practice a deposition of a proposed witness might be taken without order of court (former § 8-71). Under former §§ 1-568.10 and 1-568.11, a court order was necessary for examination of an adverse party.

Attendance of witnesses may be compelled by subpoena; attendance of a party by notice. Sanctions are provided in Rule 37 (d) in the event a party fails to respond to the notice.

The last sentence of section (a) is much broader than the federal rule, which refers only to "a person confined in prison."

Section (b).—This section indicates the broad scope of examination and that it may cover not only evidence for use at the trial, but also inquiry into matters in themselves inadmissible at trial but which will lead to the discovery of evidence unless the court otherwise directs under Rule 30 (b) or (d).

Aside from the limitations of Rule 30 (b) and (d), section (b) contains three limitations: (1) The deponent may be examined regarding any matter which is relevant to the subject matter in the pending action. (2) The deponent may not be examined regarding a matter which is privileged. (3) The deponent shall not be required to produce or submit for inspection any writing or data prescribed in the last sentence of section (b). This limitation (3) is based upon the proposed 1946 amendment to Rule 30 (b).

Section (c).—This section is the same as the federal rule.

Section (d).—The use of a deposition at the trial stage is sharply limited by section (d). To be used, a deposition must not only satisfy one of the conditions of section (d), but also the limiting phrase in the first sentence of the section, "so far as admissible under the rules of evidence."

Section (e).—This section is added out of an abundance of caution.

Editor's Note.—The cases cited in this note were decided under former § 8-71.

For case law survey on evidence, see 43 N.C.L. Rev. 900 (1965).

For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1 (1969).

For article on pre-trial and discovery, see 5 Wake Forest Intra. L. Rev. 95 (1969).

For note on discovery of expert information, see 47 N.C.L. Rev. 401 (1969).

Section 8-71 did not contemplate taking deposition of person disqualified to give evidence in a case. Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954); Waldron Buick Co. v. General Motors Corp., 251 N.C. 201, 110 S.E.2d 870 (1959); Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

Hence, it was required to be considered in connection with § 8-53, relating to confidential communications between physician and patient. Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954); Waldron Buick Co. v. General Motors Corp., 251 N.C. 201, 110 S.E.2d 870 (1959); Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

Judge May Not Enter Order in Chambers for Pretrial Examination of Physician.—The judge of the superior court has no authority to enter an order in chambers for the pretrial examination of a physician in regard to confidential communications of his patient. Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

And defendants cannot take the deposition of plaintiff's physician because under § 8-53, he is disqualified to testify as to information he acquired in attending plaintiff in a professional capacity. Waldron Buick Co. v. General Motors Corp., 251 N.C. 201, 110 S.E.2d 870 (1959).

Cited in Pearce v. Barham, 271 N.C. 285, 156 S.E.2d 290 (1967).

Rule 27. Depositions before action or pending appeal.

(a) *Before action.*—

(1) Petition.—A person who desires to perpetuate his own testimony or that of another person regarding any matter may file a verified petition in the court in the county where any expected adverse party resides.

The petition shall be entitled in the name of the petitioner and shall show (i) that the petitioner expects that he, or his personal representative, heirs, legatees, or devisees, will be a party to an action cognizable in any court, but that he is presently unable to bring it or cause it to be brought, (ii) the subject matter of the expected action and his interest therein, (iii) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, (iv) the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and (v) the names and addresses of the person to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service.—The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing, or within such time as the court may direct, the notice shall be served in the appropriate manner provided in Rule 4 (j) (1) or (2) for service of summons, but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4 (j) (1) or (2), an attorney who shall represent them. If any expected adverse party is a minor or incompetent, the provisions of Rule 17 (c) shall apply.

(3) Order and Examination.—If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose deposition may

be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of Deposition.—If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the United States or the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a court of this State in accordance with the provisions of Rule 26 (d).

(b) *Depositions before action for obtaining information to prepare a complaint.*—

(1) Petition.—A person who expects to commence an action but who desires to obtain information from an expected adverse party or from any person for whose immediate benefit the expected action will be defended for the purpose of preparing a complaint may file a verified petition in the county where any expected adverse party resides or in the county where resides any person for whose immediate benefit the expected action will be defended. If an expected adverse party is not a natural person, the petition may be filed in the county where the expected adverse party has its principal office or place of business.

The petition shall be entitled in the name of the petitioner and shall show (i) that the petitioner expects to commence an action cognizable in a court of this State, (ii) the names and addresses of the expected adverse parties, (iii) the nature and purpose of the expected action, (iv) the subject matter of the expected action and the petitioner's interest therein, (v) why the petitioner is unable to prepare a complaint with the information presently available, and (vi) that the petition is filed in good faith. The petition shall also designate with reasonable particularity the matters as to which information will be sought.

(2) Notice and Service.—After the petition is filed, proceedings shall be in conformity with section (a) (2).

(3) Order and Examination.—If the court finds that the facts are as set forth in the petition and that the examination of an expected adverse party or such party's officer, agent or employee is necessary to enable the petitioner to prepare a complaint, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the deposition shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for obtaintaining information to prepare a complaint, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of Deposition.—If a deposition to obtain information to prepare a complaint is taken under these rules, it may be used in any action involving the same subject matter subsequently brought in a court of this State in accordance with the provisions of Rule 26 (d).

(c) *Pending appeal.*—If an appeal has been taken from the determination of any court or petition for review has been filed or before the taking of an appeal or the filing of a petition if the time therefor has not expired, the court in which the determination was made may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the court. In such case the party who desires to perpetuate the testimony may make a motion in the court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the court. The motion shall show (i) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each, (ii) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and upon the same conditions as are prescribed in these rules for depositions taken in actions pending in the court.

(d) *Perpetuation by action.*—This rule does not limit the power of a court to entertain an action to perpetuate testimony. (1967, c. 954, s. 1.)

Comment. — The objectives here are to provide simple procedures for discovery when the purpose is preservation of testimony or the obtaining of information with which to prepare a complaint and further, in appropriate cases, to provide for discovery pending appeal.

Former §§ 8-85 to 8-88 provided for a special proceeding or a civil action to perpetuate testimony. Under section (a), the most significant change in respect to perpetuating testimony is that no summons is necessary. But there is a requirement of notice.

Section (b). — This section deals with discovery for the purpose of obtaining information to prepare a complaint. It carries forward all of the protections to a prospective defendant incorporated in former § 1-121. But, again, no service of process is necessary. After the contemplated order is obtained, the procedure set forth in the other discovery rules will apply.

Section (c). — This section adds something new in providing for the situation where it may be desirable to take a deposition pending an appeal.

Rule 28. Persons before whom depositions may be taken.

(a) *Within the United States.*—Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken (i) before a person authorized to administer oaths by the laws of this State or of the United States or of the place where the examination is held, or (ii) before such person as may be appointed by the court in which the action is pending.

(b) *In foreign countries.*—In a foreign state or country depositions shall be taken (i) on notice before a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent of the United States, or (ii) before such person or officer as may be appointed by commission or under letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in (here name the country)."

(c) *Disqualifications for interests.*—No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action, unless the parties otherwise agree by stipulation as provided in Rule 29.

(d) *Depositions to be used outside this State.*—

(1) A person desiring to take depositions in this State to be used in proceedings pending in the courts of any other state or country may present to a judge of the superior or district court a commission, order, notice, consent, or other authority under which the deposition is to be taken, whereupon it shall be the duty of the judge to issue the necessary subpoenas pursuant to Rule 45. Orders of the character provided in Rules

30 (b), 30 (d), and 45 (b) may be made upon proper application therefor by the person to whom such subpoena is directed. Failure by any person without adequate excuse to obey a subpoena served upon him pursuant to this rule may be deemed a contempt of the court from which the subpoena issued.

(2) The commissioner herein provided for shall not proceed to act under and by virtue of his appointment until the party seeking to obtain such deposition has deposited with him a sufficient sum of money to cover all costs and charges incident to the taking of the deposition, including such witness fees as are allowed to witnesses in this State for attendance upon the superior court. From such deposit the commissioner shall retain whatever amount may be due him for services, pay the witness fees and other costs that may have been incurred by reason of taking such deposition, and if any balance remains in his hands, he shall pay the same to the party by whom it was advanced. (1967, c. 954, s. 1.)

Comment.—This rule is the same as the federal rule except that "of this State" has been inserted in section (a), and section (d) has been added.

Under section (a) depositions for use in North Carolina need not be taken within the State. They may be taken wherever the party taking the deposition desires, subject to the protective provisions of Rule 30(b). However, a subpoena to require a witness to attend the deposition will not run outside the State. Many states have statutes comparable to present § 8-84, making their subpoena power available to compel residents to appear for depositions to be used in foreign states.

Section (d) has no counterpart in the federal rules. It is designed to permit courts in this State to assist parties in proceedings in other states to take depositions in this State for use in such proceedings. North Carolina now has such a statute as indicated above. This rule also requires the party taking a deposition to make a deposit insuring the payment of all fees and costs incident to the taking of the deposition. This practice will be new.

Rule 29. Stipulations regarding the taking of depositions.

If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner, and when so taken, may be used in the same manner as other depositions. (1967, c. 954, s. 1.)

Comment. — This rule is identical with federal Rule 29. In many cases, saving time and expense is just as important as strict formality. It should be noted that the stipulation relates only to the formalities of taking depositions, and not to their use at trial. Hence, parties may stipulate as to time, place, and manner of taking of a deposition without waiving objections to its admissibility under Rule 26 (d).

Rule 30. Depositions upon oral examinations.

(a) *Notice of examination; time and place.*—A party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. The notice shall be served on all parties at least 15 days prior to the taking of the deposition when any party required to be served resides without the State and shall be served on all parties at least 10 days prior to the taking of the deposition when all of the parties required to be served reside within the State.

(b) *Orders for the protection of parties and deponents.*—After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the judge of the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated time or place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the judge or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from unreasonable annoyance, embarrassment, expense, or oppression.

(c) *Record of examination; oath; objections.* — The person before whom the deposition is to be taken shall administer an oath to the deponent and shall personally, or by someone acting under his direction and in his presence, record the testimony of the deponent. The testimony shall be taken stenographically or by some method by which the testimony is written or typed as it is given and transcribed unless the parties agree otherwise. Where transcription is requested by a party other than the one taking the deposition, the court may order the expense of transcription or a portion thereof paid by the party making the request. All objections made at the time of the examination to the qualifications of the person before whom the deposition is taken, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the deposition by the person before whom the deposition is taken. Subject to the limitation imposed by an order under section (b) or section (d), evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the deponent and record the answers verbatim.

(d) *Motion to terminate or limit examination.*—At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, a judge of the court in which the action is pending or any judge in the county where the deposition is being taken may order the person before whom the deposition is being taken to cease taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in section (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the judge of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the judge may impose upon either party or upon the deponent the requirement to pay such costs or expenses as the judge may deem reasonable.

(e) *Submission to deponent; changes; signing.*—When the deposition is transcribed, it need not be submitted to the deponent for his examination and signature unless one of the parties or the deponent makes a request therefor. When such request is made, the deposition shall be submitted to the deponent for examination, and any changes in form or substance which the deponent desires to make shall be entered upon the deposition by the person before whom the deposition is taken with a statement of the reasons given by the deponent for making them. The deposition shall then be signed by the deponent unless he refuses to sign. If the deponent refuses to sign, the person before whom the deposition is taken shall state on the record the fact that the deponent refused to sign, together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on motion to suppress under Rule 32 (d) the judge holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) *Certification and filing; copies; notice of filing.*—

(1) When a deposition is transcribed, the person before whom it was taken

shall certify on the deposition that the deponent was duly sworn by him and that the deposition is a true record of the testimony given by the deponent. He shall then securely seal the original of the deposition in an envelope endorsed with the title of the action and marked "Deposition of [here insert name of deponent]" and shall promptly file it and one copy with the court in which the action is pending or send it and one copy by registered mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing and furnish a copy to all other parties.

(g) *Failure to attend or to serve subpoenas; expenses.*—

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the judge may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the judge may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(h) *Judge; definition.*—

(1) In respect to actions in the superior court, a judge of the court in which the action is pending shall, for the purposes of this rule, and Rule 31, Rule 33, Rule 34, Rule 35, Rule 36 and Rule 37, be either a resident judge of the judicial district or a judge regularly presiding over the courts of the district or any special superior court judge holding court within the judicial district or residing therein.

(2) In respect to actions in the district court, a judge of the court in which the action is pending shall, for the purposes of this rule, Rule 31, Rule 33, Rule 34, Rule 35, Rule 36 and Rule 37, be the chief district judge or any judge designated by him pursuant to G.S. 7A-192.

(3) In respect to actions in either the superior court or the district court, a judge of the court in the county where the deposition is being taken shall, for the purposes of this rule, be either a resident judge of the judicial district or a judge regularly presiding over the courts, or any special superior court judge holding court within the judicial district or residing therein, or the chief judge of the district court or any judge designated by him pursuant to G.S. 7A-192. (1967, c. 954, s. 1.)

Comment.—This rule prescribes the procedure for taking depositions upon oral examination. Depositions upon written interrogatories are governed by Rule 31. The procedure fixed by Rule 30 governs depositions upon oral examination in all cases, whether a deposition with or without leave of court as provided in Rule 26 (a), or under an order of court for the perpetuation of testimony before action under Rule 27 (a) or under an order of court for the perpetuation of testimony pending appeal as provided in Rule 27 (b) or under order of court as provided in Rule 27 (c).

Section (a) differs from federal Rule 30 (a) in that a specific time for serving notice prior to the taking of the deposition is fixed, instead of "reasonable notice" as is found in the federal rule. Furthermore, section (a) does not authorize the court to extend or shorten the time fixed by the rule. Such a provision is contained in federal Rule 30 (a).

Sections (b) and (d) provide for protection from abuse of the discovery procedure to either the opposing party or the person to be examined. Before the taking of the deposition begins, either may apply for protection under section (b). During the taking of the deposition either may apply for protection under section (d). Under section (b) application is made to the judge of the court in which the action is pending upon motion seasonably made. "Seasonably" means as soon as the person making the motion learns that he will need the protective order. *Moore's Federal Practice*, § 30.05, (2nd Ed.). Such a motion must comply with Rule 7 (b), be served and filed in compliance with Rule 5, and be served within the time provided in Rule 6 (d).

A change has been made in federal Rule 30 (c) in that a provision has been added with respect to the payment for transcribing when the transcription is requested by a party other than the party taking the deposition. In some cases the sole purpose of the deposition may be for discovery only, and not for use at the trial. Hence, the court should have this power.

The words "or by some method by which the testimony is written or typed as it is given" are inserted in section (c) for the purpose of indicating that, in the absence of agreement, testimony may be taken by any of the methods described.

As has been indicated, section (d) provides for protection during the taking of the deposition. Such a motion may be made before a judge of a court in which an action is pending or a judge of the court in which the deposition is being taken. Section (d) authorizes the judge to order either party or the deponent to pay such costs as may be deemed reasonable upon the granting or refusing of such a motion.

Section (e) changes former procedure to the extent that the deposition need not be signed by the deponent unless one of the parties or the deponent makes such a request.

Section (f) contains no provision for opening a deposition similar to former practice (repealed § 8-71). No good reason exists for continuing that practice, since in most cases all parties have copies of the deposition, and objections which have been entered at the taking of the deposition can be passed on at the time of trial.

Section (g) is identical with federal Rule 30 (g). Apparently there is no provision under present statutes for the taxing of expenses under such circumstances.

Rule 31. Depositions of witnesses upon written interrogatories.

(a) *Serving interrogatories; notice.*—A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within five days thereafter the latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within three days after being served with redirect interrogatories, a party may serve recross interrogatories upon the party proposing to take the deposition.

(b) *Person to take responses and prepare record.*—A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the person designated to take the deposition, who shall proceed promptly, in the manner provided by Rule 30 (c), (e) and (f), to take the testimony of the witnesses in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

(c) *Notice of filing.*—When the deposition is filed, the party taking it shall give prompt notice of its filing and furnish a copy to all other parties.

(d) *Orders for the protection of parties and deponents.*—After the service of interrogatories and prior to the taking of the testimony of the deponent, a judge of the court in which the action is pending as defined in Rule 30 (h), on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order specified in Rule 30 which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination. (1967, c. 954, s. 1.)

Comment.—This rule provides an alternative method for taking depositions which a party may employ rather than taking the deposition on oral examination as provided for in Rule 30, and follows very closely federal Rule 31.

Under former § 8-71, when a deposition was returned to the court, the clerk was required to open and pass on it after giving parties or their attorneys not less than one day's notice. Section (c) simply requires the party taking the deposition to give notice of the filing of the deposition.

"Rule 31 (d) permits a party or a deponent to make a motion in the court in which the action is pending for any protective order specified in Rule 30. The motion, however, must be made prior to the taking of the testimony of the deponent. This time limitation upon the making of the motion is perfectly proper with respect to a party, but if applied also to a motion made by a deponent, it is inconsistent with the practice that the interrogatories are not to be shown to the deponent in advance or the taking of the deposition. While the time limitation imposed by Rule 30 (d) upon the making of a motion for a protective order is in terms applicable to a motion by a deponent, it is believed that the proper practice should be that the interrogatories should not be shown to the deponent in advance of the taking of his deposition, except upon consent of the parties, and that the deponent should be allowed to make a motion for a protective order during the taking of the deposition as provided in Rule 30 (d) for the making of a similar motion by a deponent upon an oral examination." 4 *Moore's Federal Practice*, § 31.06.

Rule 32. Errors and irregularities in depositions.

(a) *As to notice.*—All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) *As to disqualification of person before whom taken.*—Objection to taking a deposition because of disqualification of the person before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) *As to taking of deposition.*—

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition.

(2) Objections to the form of written interrogatories submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within three days after service of the last interrogatories authorized.

(d) *As to completion and return of deposition.*—Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, sealed, endorsed, transmitted, filed, or otherwise dealt with by the person before whom the deposition is taken under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been ascertained.

(e) *Objection to deposition before trial.*—The clerk shall file the deposition with the other papers in the action and notify all parties that it is on file and open for inspection. Except as otherwise provided by this rule, any party may file written exceptions to the deposition either in whole or in part for any good cause. Such exceptions shall be passed upon by the judge on motion day or at pretrial. (1967, c. 954, s. 1.)

Comment.—The purpose of this rule is to require defects in the taking of depositions to be pointed out promptly in order that the erring party may have an opportunity to correct the errors and prevent waste of time and expense by a subsequent claim to suppress a deposition based upon some technical error.

Section (a) carries forward former § 1-568.23 (a).

Under former law objection based upon the disqualification of the person before whom the deposition is to be taken could be made at any time up to trial. Under section (b) such an objection would be unavailable at trial.

Sections (c) (1) and (2) follow verbatim federal Rule 32 (c) (1) and (3) and former § 1-568.23 (b) and (d).

Federal Rule 32 (c) (2), which is the same as former § 1-568.23 (c), has been omitted.

Section (d).—This section follows federal Rule 32 (d) verbatim and is quite similar to former §§ 1-568.22 and 1-568.23 (e) except in this rule objection must be made with "reasonable promptness," whereas, under former statutes, a motion to suppress must have been made within ten days after the deposition was filed.

Rule 33. Interrogatories to parties.

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 30 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined, but the making of objections to certain interrogatories shall not delay the answering of interrogatories to which objection is not made. If the objections are overruled, the court shall fix the time for answering the interrogatories.

Interrogatories may relate to any matters which can be inquired into under Rule 26 (b), and the answers may be used to the same extent as provided in Rule 26 (d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but a judge of the court in which the action is pending, as defined by Rule 30 (h), on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30 (b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule. (1967, c. 954, s. 1.)

Comment. — Under former § 1-568.17 a party might examine upon written interrogatories.

This rule provides that the scope of the interrogatories is the same as that for discovery generally, as set out in Rule 26 (b). Hence, interrogatories may be used for purposes of discovery. Also, the use of answers to interrogatories is limited by Rule 26 (d) as well as by ordinary rules of evidence.

The period in which plaintiff may not serve interrogatories without leave of court has been lengthened from 10 days, as in federal Rule 33, to 30 days. This corresponds to the time for filing answer or other pleading or motion and thus preserves the general scheme by which a defendant is given 30 days to take his first action unless the court otherwise orders.

It should be noted that this rule does not require notice to parties other than the one to be examined. Former § 1-568.17 required that a copy of the order for examination and a copy of the interrogatories be delivered to all other parties.

The problems which might be presented in cases where the interrogatories call for documents to be attached are covered in Rule 26 (b), which governs the scope of the interrogatories.

Rule 34. Discovery and production of documents and things for inspection, copying or photographing.

Discovery on court order.—Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the clerk of the court in which an action is pending or a judge of the court in which an action is pending, as defined by Rule 30 (h) may

(1) Order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody, or control; or

(2) Order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26 (b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. (1967, c. 954, s. 1; 1969, c. 895, s. 8.)

Comment.—Former statutes in a pending action authorized the court to order an inspection of writings (§ 8-89) and the production of documents (§ 8-90).

The protective provisions of Rule 30 (b) are incorporated in this rule by reference.

The provisions in this rule limiting the scope of the examination as permitted in Rule 26 (b) and the specification in Rule 26 (b) of documents which shall not be the subject of discovery would appear to provide explicit regulations on such matters and avoid complexities which have existed under the federal rules.

Editor's Note. — The 1969 amendment deleted former section (b), relating to discovery without court order.

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

The cases cited in this note were decided under former §§ 8-89 and 8-90.

Rule Remedial and to Be Liberally Construed.—See Abbitt v. Gregory, 196 N.C. 9, 144 S.E. 297 (1928); H.L. Coble Constr. Co. v. Housing Authority, 244 N.C. 261, 93 S.E.2d 98 (1956); Diocese of W.N.C. v. Sale, 254 N.C. 218, 118 S.E.2d 399 (1961).

Provides Remedy Where Discovery Is Counsel's Objective. — See Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

Substitute for Bill of Discovery.—Former § 8-89 was primarily designed and intended to afford the facilities for the ascertainment of truths that were formerly supplied by a bill of discovery. Girard Nat'l Bank v. McArthur, 165 N.C. 374, 81 S.E. 327 (1914).

Prerequisite to Order for Discovery and Inspection.—As a prerequisite to an order for pretrial discovery and inspection of documents, the courts, following their own procedure for discovery in aid of a bill of equity, have required the applicant to show by affidavit the necessity for the inspection and the materiality to the issue of the documents sought to be inspected. If the affidavit is insufficient, any order based upon it is invalid. Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

The law will not permit a "fishing or ransacking expedition" either by subpoena duces tecum or a bill of discovery. Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

Former §§ 8-89 and 8-90 did not supersede the subpoena duces tecum. Although the two are in some respects analogous, a subpoena duces tecum may not be used as a bill of discovery. Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

Plaintiffs are not entitled to discover defendants' dealing with other persons. An order of examination is only in respect to those matters which relate to the action. Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

Discretion of Court.—Whether the trial court shall grant an order for the inspection of writings upon a sufficient affidavit rests in its sound discretion. Dunlap v. London Guar. & Accident Co., 202 N.C. 651, 163 S.E. 750 (1932); Tillis v. Calvine

Cotton Mills, 244 N.C. 587, 94 S.E.2d 600 (1956).

It is within the sound discretion of the trial court to order a party to give to the adverse party an inspection and copy of any books, papers and documents in his possession or under his control which contain evidence relating to the merits of the action or the defense thereto. Abbitt v. Gregory, 196 N.C. 9, 144 S.E. 297 (1928).

When the requirements of the applicant, as set forth in former § 8-89 were met, former § 8-90 did nothing more than vest the granting of such application in the discretion of the judge. Star Mfg. Co. v. Atlantic Coast Line R.R., 222 N.C. 330, 23 S.E.2d 32 (1942).

The trial court's refusal to grant plaintiff's motion, for an order that defendant produce certain written statements signed by witnesses, employees of defendant, which statements these employees testified they used to refresh their recollection before becoming witnesses, was not error, the granting of such motion being in the discretion of the court, and the record failed to show that the requirements of former §§ 8-89 and 8-90 were met by plaintiff, or that the written statements were in court. Star Mfg. Co. v. Atlantic Coast Line R.R., 222 N.C. 330, 23 S.E.2d 32 (1942).

Where the motion is for inspection of writings in the possession of the corporate defendant, and the order allows inspection of writings in the possession of both the corporate and individual defendant, but both defendants are represented by the same counsel and it appears that the individual defendant was the president of the corporate defendant and that the writings referred to in the order all relate to business of the corporate defendant, abuse of discretion in granting the order is not shown. Tillis v. Calvine Cotton Mills, 244 N.C. 587, 94 S.E.2d 600 (1956).

Application for Order.—While a "roving commission for the inspection of papers" will not be ordinarily allowed, an application for an order for inspection of writings is sufficiently definite when it refers to papers under the exclusive control of the adverse party, which relate to the immediate issue in controversy, which could not be definitely described, and an order based thereon will be upheld. Bell v. Murchison Nat'l Bank, 196 N.C. 233, 145 S.E. 241 (1928).

Must Be Pertinent to Issue.—Upon motion to allow inspection or copy of books, papers, etc., before trial, it must be made to appear that the instrument in question relates to the merits of the action or is pertinent to the issue. Evans v. Seaboard Air Line Ry., 167 N.C. 415, 83 S.E. 617 (1914).

When No Information Could Be Gained.—A person will not be ordered to allow an inspection of the paper-writing if the party making the request knows the contents thereof. Sheek v. Sain, 127 N.C. 266, 37 S.E. 334 (1900), wherein the court said that the object of the statute was to enable a party to get information that he did not have, or to give him more definite information, or data, than he already had.

Inspection within Specified Time.—Former § 8-89 only authorized the judge to order one party to exhibit the writing to the other and required a copy to be given him or permit him to take a copy of the same, within a specified time. It was not intended that there should be an investigation of the controversies—a kind of inferior court or petty trial—with witnesses and lawyers on both sides. Sheek v. Sain, 127 N.C. 266, 37 S.E. 334 (1900).

An examination of an adverse party, under former § 1-569 et seq., could be joined with an order under former § 8-89 for an inspection of writings, in the possession or under the control of the party to be examined. Abbitt v. Gregory, 196 N.C. 9, 144 S.E. 297 (1928).

Due Notice Required.—The inspection can only be had upon the order of the court, made after due notice. Vann v. Lawrence, 111 N.C. 32, 15 S.E. 1031 (1892).

What Constitutes Due Notice. — Due notice is notice sufficient to enable the party to have the document when called for. McDonald v. Carson, 95 N.C. 377 (1886).

Generally if a party dwells in another town than that in which the trial is had, a service of notice upon him at the place where the trial is had, or after he has left home to attend court, to produce papers, is not sufficient. Beard v. Southern Ry., 143 N.C. 136, 55 S.E. 505 (1906).

Duration of Notice.—A notice to produce papers, etc., "on a trial to be had this day," is not confined to a trial on that day, but extends to a trial at a subsequent term. State v. Kimbrough, 13 N.C. 431 (1830).

Necessity that Complaint Be Filed.—A court could not under former § 8-90 order the production of papers by the defendant where no complaint had been filed, so that, in case the papers were not produced, the court could render judgment for the plaintiff, according to the provision of the section. Branson v. Fentress, 35 N.C. 165 (1851).

Acquiring Information Necessary to Filing of Complaint.—In an action against a clinic and doctors for alleged tortious defamation and disclosures of confidential information acquired professionally, plaintiff was held entitled to an order requiring defendants to produce specified papers and documents to afford information necessary to the filing of the complaint. Nance v. Gilmore Clinic, 230 N.C. 534, 53 S.E.2d 531 (1949), distinguishing Flanner v. Saint Joseph Home for Blind Sisters, 227 N.C. 342, 42 S.E.2d 225 (1947), in that the matter sought to be discovered in that case was not necessary as a basis for filing the complaint but related to a matter which it would have been improper to allege or which was not necessary to the statement of the cause of action. The case distinguished does not hold that the statute is not available in seeking information to enable plaintiff to draft his complaint. Only in respect to the discovery of evidence does the opinion hold that pleadings must first be filed and an issue raised to which the evidence sought must be pertinent.

In an action by a stockholder of a corporation to set aside as fraudulent an assignment by the corporation of a contract, the plaintiff is entitled under this section to inspect the records and books of the corporation in order to obtain information upon which to frame his complaint. This is true even though their evidence may result in a pecuniary injury. Holt v. Southern Finishing & Warehouse Co., 116 N.C. 480, 21 S.E. 919 (1895).

Where No Answer Filed. — Where no answer has been filed, the defendant is not entitled to an order to inspect a check in possession of the plaintiff. Sheek v. Sain, 127 N.C. 266, 37 S.E. 334 (1900).

Where Information to Be Used in Action against Third Party. — Though the point was not in issue, the court in Flanner v. Saint Joseph Home for Blind Sisters, 227 N.C. 342, 42 S.E.2d 225 (1947), stated that plaintiff may not proceed under former § 8-89 to examine the defendant's records and documents for the purpose of obtaining information to form the basis of an action against a third party.

Depositing Papers Not Required.—Former § 8-89 did not authorize the judge or clerk to issue an order that the respondent be required to deposit the papers in the clerk's office. Mills v. Biscoe Lumber Co., 139 N.C. 524, 52 S.E. 200 (1905).

Extent of Admission. — The papers, when produced by the method prescribed, are competent evidence for all legitimate purposes. Austin v. Secrest, 91 N.C. 214 (1884).

Proof by Parol.—The contents of a paper writing cannot be proved by parol, unless notice has been given to the adverse party, who has it in possession to produce it on trial. Murchison v. McLeod, 47 N.C. 239 (1855).

Applicability of Res Judicata.—An order of the judge, reversing an order of the clerk with reference to the production of papers, is a discretionary matter, and being an administrative order in the cause, and not affecting the merits, is not res judicata and the motion can be renewed and a new order obtained. Mills v. Biscoe Lumber Co., 139 N.C. 524, 52 S.E. 200 (1905).

Motion to Nonsuit.—A motion to nonsuit a plaintiff for not producing books or papers, cannot be made unless a previous order of the court has been obtained for the production of such books or papers. Graham v. Hamilton, 25 N.C. 381 (1843).

Where Inspection Refused.—Where the judge refuses an inspection which is of the character authorized, it still rests within his discretion to compel the production of the writing later or upon trial, when its competency and pertinency as evidence bearing on the issue may be better determined. Evans v. Seaboard Air Line Ry., 167 N.C. 415, 83 S.E. 617 (1914).

The affidavit supporting an order for inspection of writings must sufficiently designate the writings sought to be inspected and show that they are material to the inquiry, and where the affidavit is insufficient the order based thereon is invalid. Dunlap v. London Guar. & Accident Co., 202 N.C. 651, 163 S.E. 750 (1932); Flanner v. Saint Joseph Home for Blind Sisters, 227 N.C. 342, 42 S.E.2d 225 (1947); H.L. Coble Constr. Co. v. Housing Authority, 244 N.C. 261, 93 S.E.2d 98 (1956); Tillis v. Calvine Cotton Mills, 244 N.C. 587, 94 S.E.2d 600 (1956).

An application for an order for inspection of writings is sufficiently definite when it refers to papers under the exclusive control of the adverse party which relate to the immediate issue in controversy, and which cannot be more definitely described by applicant. Rivenbark v. Shell Union Oil Corp., 217 N.C. 592, 8 S.E.2d 919 (1940).

And Must Show Materiality and Necessity.—It is required that the affidavit set forth facts showing the materiality and necessity of the papers sought to be produced, and the mere averment that they are material and necessary is insufficient. Patterson v. Southern Ry., 219 N.C. 23, 12 S.E.2d 652 (1941).

Affidavit for Nonproduction. — Where the plaintiff's affidavit stated that he had not seen the letter (ordered produced) since he first sent it, that he had not knowingly destroyed it, and had made diligent search for it and could not find it, it was held to be sufficient cause shown for a discharge of the rule for its production. Fuller v. McMillan, 44 N.C. 206 (1853).

Appeal.—An appeal lies from an order requiring a person to allow an inspection of paper writings. Sheek v. Sain, 127 N.C. 266, 37 S.E. 334 (1900).

The Supreme Court will not pass upon the propriety of discharging a rule for the production of papers unless the facts are stated upon which the application is based. Maxwell v. McDowell, 50 N.C. 391 (1858).

Rule 35. Physical and mental examination of persons.

(a) *Order for examination.*—In an action in which the mental or physical condition or the blood relationship of a party, or of an agent or a person in the custody or under the legal control of a party, is in controversy, a judge of the court in which the action is pending as defined by Rule 30 (h), may order the party to submit to a physical or mental or blood examination by a physician, or to produce for such examination his agent or the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) *Report of findings.*—

(1) If requested by the party against whom an order is made under section (a) or by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions, together with like reports of all earlier examinations of the same condition. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party or person examined a like report of any examination, previously or thereafter made, of the same condition. If the party or person examined refuses to deliver such report, the judge on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report, the judge may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same condition. (1967, c. 954, s. 1.)

Comment.—*Section (a).* — This section differs from federal Rule 35 (a) only in the inclusion of certain changes proposed by the Advisory Committee in its 1955 report. Such inclusions make clear the right to require a blood test in an action in which blood relationships are in controversy. The provision for the examination of a person in the custody or under the legal control of a party will permit the examination of a minor or incompetent.

This procedure is new to North Carolina practice. However, the right to require the plaintiff in a civil action to recover personal injuries to submit to a physical examination was recognized in Flythe v. Eastern Carolina Coach Co., 195 N.C. 777, 143 S.E. 865 (1928). Section 8-50.1 authorizes the court in actions in which the question of paternity arises to order a blood test.

Section (b). — This section permits the party examined to obtain the report of the physician making the examination. Since the party causing the examination could not obtain a copy of such a report made at the instance of the examined party because he might claim the report was privileged, this rule expressly provides that after the examined party requests a copy of the report of the examination made at the instance of the party causing the examination, the latter is entitled upon request to receive a report from the party examined of any examination previously or thereafter made concerning the same mental or physical examination.

The court is given the discretionary power to order that a copy of the report be furnished to any other party to the action.

Rule 36. Admission of facts and of genuineness of documents.

(a) *Request for admission.* — After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action, leave to do so must be obtained. Such leave may be granted with or without notice, and by the clerk of the court in which the action is pending or by a judge of the court in which the action is pending, as defined by Rule 30 (h). Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 20 days after service thereof or within such shorter or longer time as may be allowed on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either

(1) A sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or

(2) Written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part.

If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder. If a request is refused because of lack of information or knowledge upon the part of the party to whom the request is directed, he shall also show in his sworn statement that the means of securing the information or knowledge are not reasonably within his power.

(b) *Procedure on objections.*—If written objections are made, the party serving the request may, on motion and notice to all other parties, apply to a judge of the court in which the action is pending, as defined by Rule 30 (h), for an order directing the objecting party to respond to the request. The party serving the request may apply, in like manner, for a similar order when he regards the reasons set forth for neither admitting or denying the request as insufficient.

(c) *Use of admissions; effect thereof.*—Objection to the use of an admission obtained under this rule at the trial or hearing may be made irrespective of whether there has been prior objection. Any admission made pursuant to this rule is for the purpose of the pending action only and neither constitutes an admission by the party for any other purpose nor may the admission be used against him in any other proceeding. (1967, c. 954, s. 1.)

Comment.—Pretrial admissions of genuineness of documents were governed by former § 8-91. The provisions of this statute regarding taxation of costs are carried forward in Rule 37 (c).

The last sentence of section (a) is designed to preclude a party from offering lack of knowledge as a ground for refusing to admit when, in fact, he has the means to such knowledge reasonably within his power. To allow such a technical ground for refusal on any other basis would render the effect of the admission provision practically useless.

Section (b) does not appear in the federal rule. This section places the burden on the party serving the request to answer to interrogatories or detail reasons why he cannot.

Rule 37. Failure to make discovery; consequences.

(a) *Failure to answer.*—If a party or other deponent does not answer any question propounded upon oral examination, the examination shall be completed on other matters and then adjourned. Thereafter, on five days' notice to all persons affected thereby, the proponent may apply to a judge of the court in which the action is pending or a judge of the court in the county where the deposition is being taken, as defined by Rule 30 (h), for an order compelling an answer. Upon the failure of a deponent to answer any interrogatory submitted under Rule 31 or upon the failure of a party to answer any interrogatory submitted under Rule 33, the proponent may on like notice make like application for such an order. If the motion is granted, the order shall fix a time and place for further examination or a time for responding to the interrogatory as the case may be. No additional notice of examination need be given.

(b) *Failure to comply with order or to answer after denial of protective order.*—

(1) If a party or other witness fails without good cause to be sworn or fails without good cause to answer any question or interrogatory after being directed to do so by the judge, such failure may be considered a contempt of court.

(2) Other consequences:

If any party or an officer or managing agent of a party fails without good cause to obey an order made under section (a) of this rule requiring him to answer designated questions or interrogatories, or an order made under Rule 34, Rule 35 or Rule 36, the judge may make such orders in respect to the failure to answer as are just. The relief granted may include, if just, the following:

a. An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental or blood condition sought to be examined, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of the physical or mental or blood condition sought to be examined.

c. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed or the question or interrogatory is answered; or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

d. When a party has failed to comply with an order under Rule 35 (a) requiring him to produce another for examination, such orders as are listed in paragraphs a, b and c of this subsection of this rule unless the party failing to comply shows that he is unable to produce such person for examination.

(c) *Expenses on refusal to admit.*—If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the genuineness of any such document or the truth of any such matter of fact is thereafter established by the admission of such party, or by the verdict of the jury, or by a finding by the court when there is a trial without a jury, he may apply to the judge for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, excluding attorney's fees. If the judge finds that there were no good reasons for the denial and that the admissions sought were of substantial importance, the order shall be made.

(d) *Failure of party to attend or serve answers.*—If a party or an officer or managing agent of a party without good cause fails to appear before the person before whom the deposition is to be taken, after being served with a proper notice, or without good cause fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, a judge of the court in which the action is pending, as defined by Rule 30 (h), on motion and notice may make such orders as may be just including, among others, the striking of all or any part of any pleading of that party, or dismissing the action or proceeding or any part thereof, or the entry of a judgment by default against that party. (1967, c. 954, s. 1.)

Comment.—Under § 8-78 and former §§ 1-568.18 and 1-568.19, sanctions against either a deponent or adverse party for failure to answer or to appear are provided for. Under § 8-78 a deponent may be committed to jail upon warrant of the commissioner before whom the deposition is taken. Under former §§ 1-568.18 and 1-568.19 sanctions could be applied only upon order of court issued either by the clerk of superior court in which the action was pending or the judge having jurisdiction.

Under this rule sanctions can be applied only for failure to comply with a court order. Hence, if discovery procedure requires a court order as under Rules 34 or 35, failure to obey the order can be punished immediately under section (b) (2). But where the discovery procedure is set in motion by the parties themselves, the party seeking discovery must first obtain a court order under section (a) requiring the recalcitrant party or witness to make discovery. The only exception to this is found in section (d), which permits an immediate sanction against parties, their officers, or managing agents for a willful failure to appear.

Editor's Note.—For article on pre-trial and discovery, see 5 Wake Forest Intra. L. Rev. 95 (1969).

ARTICLE 6.

Trials.

Rule 38. Jury trial of right.

(a) *Right preserved.*—The right of trial by jury as declared by the Constitution or statutes of North Carolina shall be preserved to the parties inviolate.

(b) *Demand.*—Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be made in the pleading of the party or endorsed on the pleading.

(c) *Demand—specification of issues.*—In his demand a party may specify the issues which he wishes so tried; otherwise, he shall be deemed to have demanded trial by jury for all the issues so triable. If a party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the last pleading directed to such issues or within 10 days after service of the demand, whichever is later, or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues in the action.

(d) *Waiver.*—Except in actions wherein jury trial cannot be waived, the failure of a party to serve a demand as required by this rule and file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury as herein provided may not be withdrawn without the consent of the parties who have pleaded or otherwise appear in the action. (1967, c. 954, s. 1.)

Comment.—This rule and Rule 39 provide for the preservation of the right to jury trial and methods for claim and waiver of that right. The principal change effected is that waiver of right to jury trial is accomplished by a failure seasonably to demand jury trial.

North Carolina Const., Art. IV, § 12, specifically provides that jury trial can be waived, and former § 1-184 set up three methods by which there could be such waiver. They were: (1) By failing to appear at the trial; (2) by written consent filed with the clerk; and (3) by oral consent entered in the minutes. All three methods are retained. See Rule 39 (a). But a fourth is added which has as its object the early ascertainment of those cases in which there will be no jury. This knowledge is useful in calendaring a case and in counsel's preparation for trial.

The requirement of positive action by a party to preserve the right to jury trial is not at all new in certain areas—references and mandamus for example. In respect to references, see Simmons v. Lee, 230 N.C. 216, 53 S.E. 79 (1949). See also Rule 53 and the accompanying note. In respect to mandamus, see former § 1-513. This statute has been repealed and jury trial in respect to mandamus is now governed by this rule and Rule 39.

The procedure for demanding jury trial is simple. The demand may be within a pleading or endorsed thereon or by separate document. No particular form of words is prescribed. As to the time when the demand must be made, generally it will be "not later than 10 days after the service of the last pleading" directed to the issue in question. But it will be observed that section (c) makes it possible for a party to demand jury trial only for some of the issues. To adjust to the situation where, for example, a plaintiff in a negligence suit might have failed to demand jury trial on any issue and the defendant, at the last moment (on the 10th day after filing his answer), demands jury trial on only the damage issue, the rule allows the plaintiff 10 days after the service of the defendant's demand in which to demand jury trial on other issues.

The reference in section (d) to actions wherein jury trial cannot be waived would include actions for divorce not based on one year's separation. See § 50-10.

In keeping with present law [see J.L. Roper Lumber Co. v. Elizabeth City Lumber Co., 137 N.C. 431, 49 S.E. 946 (1905)], Rule 39 (b) authorizes a judge to disregard a waiver of jury trial.

Editor's Note.—For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1 (1969). For article on trial under the new rules, see 5 Wake Forest Intra. L. Rev. 138 (1969).

Rule 39. Trial by jury or by the court.

(a) *By jury.*—When trial by jury has been demanded and has not been withdrawn as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless

(1) The parties who have pleaded or otherwise appeared in the action or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the minutes, consent to trial by the court sitting without a jury, or

(2) The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes.

(b) *By the court.*—Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a trial by jury in an action in which such a demand might have been made of right, the court in its discretion upon motion or of its own initiative may order a trial by jury of any or all issues.

(c) *Advisory jury and trial by consent.*—In all actions not triable of right by a jury the court upon motion or if its own initiative may try any issue or question of fact with an advisory jury or the court, with the consent of the parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right. In either event the jury shall be selected in the manner provided by Rule 47 (a). (1967, c. 954, s. 1.)

Comment.—As indicated in the note to Rule 38, this rule carries forward the essence of former § 1-184 in respect to methods of waiver and the present power of the judge to require trial by jury, even though there has been a waiver. Moreover, provision is made for trial by jury when there is no right to such trial if the judge decides such a course is desirable or if the parties consent.

Rule 40. Assignment of cases for trial; continuances.

(a) The resident judge of any judicial district senior in point of continuous service on the superior court may provide by rule for the calendaring of actions for trial in the superior court division of the various counties within his district. Calendaring of actions for trial in the district court shall be in accordance with G.S. 7A-146. Precedence shall be given to actions entitled thereto by any statute of this State.

(b) No continuance shall be granted except upon application to the court. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require. (1967, c. 954, s. 1; 1969, c. 895, s. 9.)

Comment.—This rule, as does the present Rule of Practice in the Superior Court, provides ultimately for judicial control of the calendar. The reference to the judge "senior in point of continuous service" is merely to designate the responsible judge in those districts having more than one judge.

Editor's Note. — The 1969 amendment added "continuances" to the catchline to this rule, designated the former provisions of this rule as section (a) and added section (b).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

Rule 41. Dismissal of actions.

(a) *Voluntary dismissal; effect thereof.*—

(1) By Plaintiff; by Stipulation.—Subject to the provisions of Rule 23 (c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

(2) By Order of Judge.—Except as provided in subsection (1) of this section, an action or any claim therein shall not be dismissed at the plaintiff's instance save upon order of the judge and upon such terms and conditions as justice requires. Unless otherwise specified in the order, a dismissal under this subsection is without prejudice. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time.

(b) *Involuntary dismissal; effect thereof.*—For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 (a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.

(c) *Dismissal of counterclaim; cross claim, or third-party claim.*—The provisions of this rule apply to the dismissal of any counterclaim, cross claim, or third-party claim.

(d) *Costs.*—A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall dismiss the action. (1967, c. 954, s. 1; 1969, c. 895, s. 10.)

Comment.—*Section (a).* — The absolute right of a plaintiff to take a voluntary nonsuit for any or no reason at all at any time before verdict is beyond question under present law. Southeastern Fire Ins. Co. v. Walton, 256 N.C. 345, 123 S.E.2d 780 (1962). The vice of such an arrangement appears clearly in the following excerpt from an opinion of a federal judge:

> "Before the effective date of [Rule 41] it not infrequently happened . . . that in a case . . . which had come to issue, perhaps after disposition of preliminary motions, which had gone to trial, in the trial of which plaintiff had introduced all his testimony, for the trial of which defendant had called witnesses from great distances and incurred great expense, the plaintiff would dismiss just at the moment the court was about to direct a verdict for defendant. The next day he might bring the same suit again. And the process might be repeated time after time. It was an outrageous imposition not only on the defendant but also on the court. Rule 41 has done much to put an end to that evil.
>
> "The evil aimed at by the rule most largely is manifested in the extreme situation described. To a lesser extent it is present in any instance in which a defendant is damaged by being dragged into court and put to expense with no chance whatever . . . of having the suit determined in his favor." McCann v. Bentley Stores Corp., 34 F. Supp. 234 (W.D. Mo. 1940).

Under the rule, the plaintiff's absolute right of dismissal is confined to the period before answer or a motion for summary judgment—the period before which there has been a heavy expenditure of time and effort by the court and other parties. Thereafter, the plaintiff can dismiss only with the consent of the other parties or with the permission of the judge. This latter provision allowing dismissal with the permission of the judge should be ample to take care of the hardship case where, for quite legitimate reasons, the plaintiff is unable to press his claim. It should be noted, however, that the judge is authorized to condition the dismissal on terms. For the federal practice in respect to terms, see 5 *Moore's Federal Practice*, § 41.06.

It should also be observed that the first voluntary dismissal will have the same effect as is now accorded a voluntary nonsuit, i.e., it is not a judgment on the merits. But a second dismissal, no matter where the first action was brought, will be a judgment on the merits.

Section (b).—Under this section, whether the action be a nonjury action or a jury action, there may be a motion for a dismissal because of failure of a plaintiff to prosecute or for a failure "to comply with these rules or any order of court." The power of the court to dismiss for failure to prosecute is well established [see Wynne v. Conrad, 220 N.C. 355, 17 S.E.2d 514 (1941)] and the rule merely gives statutory recognition of this power.

In respect to a motion for dismissal because of noncompliance with these rules or an order of court, the propriety of a dismissal will, of course, depend on the rule or order which has not been complied with. The rule does not undertake to say in what circumstances a dismissal will be proper any more than it attempts arbitrarily to declare what is a failure to prosecute.

In an action tried by the court without a jury, the rule provides for a motion similar to the familiar motion for compulsory nonsuit under former § 1-183. It is contemplated that where there is a jury trial, Rule 50 will come into play with its motion for a directed verdict. For a discussion of the interrelation of this rule and Rule 50, see the comment to Rule 50. The practice under section (b) will be much like that under former § 1-183. But there are some changes. The court is empowered to determine that its adjudication shall be on the merits and to find the facts in appropriate cases at the close of the plaintiff's evidence.

Section (c). — This section makes clear that the rule is applicable to all situations in which a claim is capable of being pressed under these rules.

Section (d).—This section makes certain that one, other than a plaintiff suing in forma pauperis, will have paid the costs in the first action before he can maintain a second action on the same claim.

Editor's Note. — The 1969 amendment rewrote sections (a), (b) and (c).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

Rule 42. Consolidation; separate trials.

(a) *Consolidation.*—When actions involving a common question of law or fact are pending in one division of the court, the judge may order a joint hearing or trial of any or all the matters in issue in the actions; he may order all the actions consolidated; and he may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. When actions involving a common question of law or fact are pending in both the superior and the district court of the same county, a judge of the superior court in which the action is pending may order all the actions consolidated, and he may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) *Separate trials.*—The court may in furtherance of convenience or to avoid prejudice and shall for considerations of venue upon timely motion order a separate trial of any claim, crossclaim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, crossclaims, counterclaims, third-party claims, or issues. (1967, c. 954, s. 1.)

Comment. — Section (a), providing for consolidation of actions "involving a common question of law or fact," invokes a power that North Carolina courts have long exercised. See McIntosh, *North Carolina Practice and Procedure* (1st ed.) pp. 536-537, § 506. Section (b) furnishes the court with the contrasting power of severance. With the multisided law suit made possible by these rules, it is safe to say that there will be more frequent occasion for the exercise of this power than formerly. Indeed, the power of severance is an indispensable safety valve to guard against the occasion where a suit of unmanageable size is thrust on the court. Whether or not there should be a severance rests in the sound discretion of the judge. For occasions where severance has been thought appropriate, see 5 *Moore's Federal Practice*, § 42.03.

Rule 43. Evidence.

(a) *Form.*—In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules.

(b) *Examination of hostile witnesses and adverse parties.*—A party may interrogate any unwilling or hostile witness by leading questions and may contradict and impeach him in all respects as if he had been called by the adverse party. A party may call an adverse party or an agent or employee of an adverse party, or an officer, director, or employee of a public or private corporation or of a partnership or association which is an adverse party, or an officer, agent or employee of a state, county or municipal government or agency thereof which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party.

(c) *Record of excluded evidence.*—In an action tried before a jury, if an objection to a question propounded to a witness is sustained by the court, the court on request of the examining attorney shall order a record made of the answer the witness would have given. The court may add such other or further statement as clearly shows the character of the evidence, the form in which is was offered, the objection made and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any grounds or that the witness is privileged.

(d) *Affirmation in lieu of oath.*—Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) *Evidence on motions.*—When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions. (1967, c. 954, s. 1.)

Comment. — While these rules do not deal extensively with questions of evidence, matters dealt with by the federal rules have been considered.

Section (a).—This section continues the usual practice of testimony being taken orally in open court. The "unless" clause refers principally to the provisions for the use of depositions in Rule 26 (d).

Section (b).—This section deals with the situation where a party is forced to call his adversary as a witness. Under former provisions of § 8-50, one was permitted in this situation to cross-examine the witness and to contradict him but not to impeach him. This latter restriction is removed on the theory that a party who is so desperate as to be forced to call his adversary as a witness should be allowed the greatest latitude in refuting his adversary's testimony, should that be desirable. Section (b) also enlarges and spells out in greater detail the category of witnesses to whom its special provisions apply. The former provisions of § 8-50 said only that where a corporation is a party, its "officers or agents" are within its scope.

Section (c). — This section continues present practice.

Section (d).—This section makes available to all the privilege of using an affirmation instead of an oath. Under § 11-4, only Quakers, Moravians, Dunkers and Mennonites are so privileged.

Section (e). — This section continues present practice.

Rule 44. Proof of official record.

(a) *Authentication of copy.*—An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is without the State of North Carolina but within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

(b) *Proof of lack of record.*—A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) *Other proof.*—This rule does not prevent the proof of official records specified in Title 28, U.S.C. §§ 1738 and 1739 in the manner therein provided; nor of entry or lack of entry in official records by any method authorized by any other applicable statute or by the rules of evidence at common law. (1967, c. 954, s. 1.)

Comment.—North Carolina had no general statute, applying to all official custodians of records, in respect to the proof of official records. Section (a) supplies this omission and makes unnecessary reliance on statutes applicable to particular custodians and to particular situations. For reference to and discussion of the North Carolina statutes, see Stansbury, *North Carolina Evidence*, § 154.

Section (b) provides a simple method for producing evidence of nonexistence of a record.

Section (c), out of an abundance of caution, leaves as alternative methods of proof any methods now existing. For various statutes, see chapter 8 of the General Statutes, article 2 and article 3. 28 U.S.C., §§ 1738 and 1739 have to do with proof of records in other states and in territories and possessions of the United States. In addition, the two sections prescribe the "faith and credit" these records are to have when duly authenticated.

Rule 45. Subpoena.

(a) *For attendance of witnesses; issuances; form.*—A subpoena for the purpose of obtaining the testimony of a witness in a pending cause shall, except as hereinafter provided, be issued at the request of any party by the clerk of superior court for the county in which the hearing or trial is to be held. A subpoena shall be directed to the witness, shall state the name of the court and the title of the action, the name of the party at whose instance the witness is summoned, and shall command the person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) *Issuance by a judge.*—Such subpoena may also be issued by any judge of the superior court, judge of the district court, or magistrate.

(c) *For production of documentary evidence.*—A subpoena may also command the person to whom it is directed to produce the records, books, papers, documents, or tangible things designated therein. Where the subpoena commands any custodian of public records to appear for the sole purpose of producing certain records in his custody, the custodian subpoenaed may, in lieu of a personal appearance, tender to the court by registered mail certified copies of the records requested, together with an affidavit by the custodian as to the authentication of the records tendered or, if no such records are in his custody, an affidavit to that effect. Any original or certified copy or affidavit delivered under the provisions of this rule, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. The judge, upon motion to quash or modify made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may

(1) Quash or modify the subpoena if it is unreasonable and oppressive and in such case may order the party in whose behalf the subpoena is issued to pay the person to whom the subpoena is directed part or all of his reasonable expenses including attorneys' fees or

(2) Grant the motion unless the party in whose behalf the subpoena is issued advances the reasonable cost of producing the records, books, papers, documents, or tangible things.

(d) *Subpoena for taking depositions; place of examination.*—

(1) Proof of service of a notice to take a deposition as provided in Rules 30 (a) and 31 (a) constitutes a sufficient authorization for the issuance by the clerk of the superior court for the county in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to pro-

duce designated records, books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b), but in that event the subpoena will be subject to the provisions of section (b) of Rule 30 and section (c) of this rule.

(2) A resident of the State may be required to attend for examination by deposition only in the county wherein he resides or is employed or transacts his business in person. A nonresident of the State may be required to attend for such examination only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

(e) *Service.*—All subpoenas may be served by the sheriff, by his deputy, by a constable, by a coroner or by any other person who is not a party. Service may be made only by the delivery of a copy to the person named therein by any person authorized in this section to serve subpoenas, or by telephone communication with the person named therein by any process officer as specified in this section, or by mailing the subpoena, registered or certified mail, return receipts requested, by any process officer specified in this section. Personal service shall be proved by return of the process officer making service and by return under oath of any other person making service. Service by telephone communication shall be proved by return of the process officer noting the method of service. Service by registered or certified mail shall be proved by filing the return receipt with the return.

(f) *Punishment for failure to obey.*—Failure by any person without adequate cause to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued. Failure by a party without adequate cause to obey a subpoena served upon him shall also subject such party to the sanctions provided in Rule 37 (d). (1967, c. 954, s. 1; 1969, c. 886, s. 1.)

Comment.—This rule would seem to be largely self-explanatory. An effort has been made to provide a convenient and highly flexible practice in respect to subpoenas. It will be noted that the subpoena is to be directed to the witness rather than to the sheriff as our present statute provides. The party obtaining the subpoena will deliver it to the appropriate sheriff or other proper person for service.

The differences between sections (a) and (c) on the one hand, and section (d) on the other should also be noted. In sections (a) and (c), it is contemplated that the subpoena will issue from the court where the action is to be tried wherever the witness is likely to be found, while in section (d) the idea is that the subpoena shall issue from the court of the county where the deposition is to be taken. The limitations of section (d) in no way affect where the subpoena may be served nor do they in any way apply to sections (a) and (c).

Editor's Note. — The 1969 amendment rewrote the opening paragraph of section (c).

Session Laws 1969, c. 886, s. 3, as amended by Session Laws 1969, c. 1276, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

Rule 46. Objections and exceptions.

(a) *Rulings on admissibility of evidence.*—

(1) When there is objection to the admission of evidence on the ground that the witness is for a specified reason incompetent or not qualified or disqualified, it shall be deemed that a like objection has been made to any subsequent admission of evidence from the witness in question. Similarly, when there is objection to the admission of evidence involving a specified line of questioning, it shall be deemed that a like

objection has been taken to any subsequent admission of evidence involving the same line of questioning.

(2) If there is proper objection to the admission of evidence and the objection is overruled, the ruling of the court shall be deemed excepted to by the party making the objection. If an objection to the admission of evidence is sustained or if the court for any reason excludes evidence offered by a party, the ruling of the court shall be deemed excepted to by the party offering the evidence.

(3) No objections are necessary with respect to questions propounded to a witness by the court or a juror but it shall be deemed that each such question has been properly objected to and that the objection has been overruled and that an exception has been taken to the ruling of the court by all parties to the action.

(b) *Rulings and orders not directed to the admissibility of evidence.*—With respect to rulings and orders of the court not directed to the admissibility of evidence, formal objections and exceptions are unnecessary. In order to preserve an exception to any such ruling or order or to the court's failure to make any such ruling or order, it shall be sufficient if a party, at the time the ruling or order is made or sought, makes known to the court his objection to the action of the court or makes known the action which he desires the court to take and his ground therefor; and if a party has no opportunity to object or except to a ruling or order at the time it is made, the absence of an objection or exception does not thereafter prejudice him.

(c) *Instruction.*—If there is error, either in the refusal of the judge to grant a prayer for instructions, or in granting a prayer, or in his instructions generally, the same is deemed excepted to without the filing of any formal objections. (1967, c. 954, s. 1.)

Comment.—Section (a) (1) is aimed at situations where repeated objections in respect to the admission of evidence have been necessary in order to assure review. In Shelton v. Southern Ry., 193 N.C. 670, 139 S.E. 232 (1927), the court declared:

"It is thoroughly established in this State that, if incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been given in other parts of the examination, the benefit of the exception is ordinarily lost."

This proposition has recently been reaffirmed in Dunes Club, Inc. v. Cherokee Ins. Co., 259 N.C. 294, 130 S.E.2d 625 (1963). Thus, apparently the only course of safety for counsel to follow under prior practice would be to object at every opportunity. It would seem that a single objection should suffice in either of the two situations specified in subsection (1).

Section (a) (2) continues the present practice.

Section (a) (3) continues the present practice of making unnecessary objection or exception with respect to questions propounded by a juror or by the judge. See former § 1-206 (d).

Section (b), it will be noted, applies to all nonevidentiary rulings and orders. In this respect, it is new. However, the general principle of the section has been in North Carolina practice for some time in respect to rulings on motions for nonsuit. See former § 1-183.

Section (c) continues present practice. See former § 1-206, subsection (b), and the note to Rule 51.

Rule 47. Jurors.

Inquiry as to the fitness and competency of any person to serve as a juror and the challenging of such person shall be as provided in chapter 9 of the General Statutes. (1967, c. 954, s. 1.)

Rule 48. Juries of less than twelve—majority verdict.

Except in actions in which a jury is required by statute, the parties may stipulate that the jury shall consist of any number less than 12 or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury. (1967, c. 954, s. 1.)

Comment. — Since jury trial may be waived entirely, it is certainly appropriate with the consent of the parties that trial be by a jury of less than 12 and that the usual rule of unanimity not prevail. The rule recognizes the exception in actions for divorce provided by § 50-10. Under the rule therefore, if there is a jury trial in a divorce action (there may not be; § 50-10 provides for waiver when the ground alleged is one year's separation) it will be by a jury of 12 and the rule of unanimity will prevail.

Rule 49. Verdicts.

(a) *General and special verdicts.*—The judge may require a jury to return either a general or a special verdict and in all cases may instruct the jury, if it renders a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. A general verdict is that by which the jury pronounces generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only.

(b) *Framing of issues.*—Issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues. The issues, material to be tried, must be made up by the attorneys appearing in the action, or by the judge presiding, and reducing to writing, before or during the trial.

(c) *Waiver of jury trial on issue.*—If, in submitting the issues to the jury, the judge omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the judge may make a finding; or, if he fails to do so, he shall be deemed to have made a finding in accord with the judgment entered.

(d) *Special finding inconsistent with general verdict.*—Where a special finding of facts is inconsistent with the general verdict, the former controls, and the judge shall give judgment accordingly. (1967, c. 954, s. 1.)

Comment.—A distinguished scholar has said that the North Carolina verdict practice "has enabled, more than any other factor perhaps, a very small judiciary to care for the litigation of one of the larger states." Green, *A New Development in Jury Trial*, 13 ABAJ 715, at p. 716 (1927). The Commission shares this high opinion of the North Carolina practice and, in its more essential respects, the Commission proposed its retention. It will be observed that sections (a), (b) and (d) are practically drawn verbatim from former §§ 1-200 [section (b) of this rule]; 1-201 [the last two sentences of section (a)]; § 1-202 [section (d)]; former § 1-203 [the first sentence of section (a)].

There are some changes produced by the rule. Former § 1-203 permitted the jury "in their discretion" to return either a general or special verdict "in every action for the recovery of money only or specific real property." No instances of an exercise of this discretion were known to the Commission, and it saw no purpose in not allowing the judge to control the form of verdict. Accordingly, it omitted any reference to the jury's discretion in this respect.

Section (c) changes the law in respect to issues omitted by the judge in submitting a case to the jury. The right to jury trial on such issues would be lost in the absence of a demand for such submission and the judge would be empowered to make a finding on the issue in question. The idea is that the inadvertent omission of an issue ought not to jeopardize a whole trial when an impartial fact finder is on hand to make the requisite finding. Ample means for a party to protect his right to jury trial on all issues are clearly available. All he has to do is demand their submission "before the jury retires."

Section (c) also employs, in the case of an omitted issue and an omitted finding by the judge, a presumption of a finding in accord with the judgment. Formerly, in this situation, nothing was presumed in support of the judgment in jury cases. Tucker v. Satterthwaite, 120 N.C. 118, 27 S.E. 45 (1897).

Finally, it will be observed that the rule speaks of issues "raised in the pleadings or by the evidence." Normally, the issues will be raised by the pleadings but under Rule 15 (b) provision is made for regarding the pleadings as amended whenever an issue outside the pleadings is tried with consent of the parties, express or implied. Thus, it will not be essential for the pleadings to reflect, on every occasion, all the issues.

Editor's Note.—The cases cited in this note were decided under former §§ 1-196, 1-200 and 1-201.

Provisions Mandatory.—These provisions are mandatory. It is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings. Wheeler v. Wheeler, 239 N.C. 646, 80 S.E.2d 755 (1954); Nebel v. Nebel, 241 N.C. 491, 85 S.E.2d 876 (1955). See Coulbourn v. Armstrong, 243 N.C. 663, 91 S.E.2d 912 (1956); General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 117 S.E.2d 479 (1960); Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

The submission of issues is not a mere matter within the discretion of the court, but it is now a mandatory requirement of the law, and a failure to observe this requirement will entitle the party who has not in some way lost the right to have the error of the court corrected. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

Purpose of requirement that issues must arise on the pleadings is to prevent surprise and to give each party the opportunity to prepare his case. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

When Issue Arises upon the Pleadings.—An issue arises upon the pleadings when a material fact is alleged by one party and controverted by the other. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

Single Issue Sufficient.—Of the issues raised by the pleadings, the judge who tries the case may in his discretion submit one or many, provided that neither of the parties to the action is denied the opportunity to present to the jury any view of the law arising out of the evidence through the medium of pertinent instructions on some issue passed upon. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

The judge is required to submit such issues as are necessary to settle the material controversies arising on the pleadings. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

It is the duty of the judge to submit such issues as are necessary to settle the material controversies in the pleadings. In the absence of such issues, witout admissions of record sufficient to justify the judgment rendered, the Supreme Court will remand the case for a new trial. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

It is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings. Wheeler v. Wheeler, 239 N.C. 646, 80 S.E.2d 755 (1954); Nebel v. Nebel, 241 N.C. 491, 85 S.E.2d 876 (1955). See Coulbourn v. Armstrong, 243 N.C. 663, 91 S.E.2d 912 (1956); General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 117 S.E.2d 479 (1960).

Issues of fact raised by the pleadings must be submitted to the jury. Baker v. Malan Constr. Corp., 255 N.C. 302, 121 S.E.2d 731 (1961).

Only Issues "Material to Be Tried" Are to Be Submitted.—Even though the facts relating to a particular issue are controverted in the pleadings, when such issue is not "material to be tried" and is not determinative of the rights of the parties, it is error to submit such issue. Henry Vann Co. v. Barefoot, 249 N.C. 22, 105 S.E.2d 104 (1958).

It is necessary to submit to the jury only such issues as arise upon the pleadings and are material to be tried. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

The court need not submit issues in any particular form. If they are framed in such a way as to present the material matters in dispute and so as to enable each of the parties to have the full benefit of his contention before the jury and a fair chance to develop his case, and if, when answered, the issues are sufficient to determine the rights of the parties and to support the judgment, the requirement of this section is fully met. O'Briant v. O'Briant, 239 N.C. 101, 79 S.E.2d 252 (1953).

Ordinarily the form and number of issues in a civil action are left to the sound discretion of the judge and a party cannot complain because a particular issue was not submitted to jury in the form tendered. Griffin v. United Servs., Life Ins. Co., 225 N.C. 684, 36 S.E.2d 225 (1945); Durham Lumber Co. v. Wrenn-Wilson Constr. Co., 249 N.C. 680, 107 S.E.2d 538 (1959); General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 117 S.E.2d 479 (1960).

Ordinarily it is within the sound discretion of the trial judge as to what issues shall be submitted to the jury and the form thereof. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

The form and number of issues to be submitted is a matter which rests in the sound discretion of the trial judge, it being sufficient that the issues be framed so as to present the material matters in dispute, to enable each party to have the full benefit of his contentions before the jury and to enable the court, when the issues are answered, to determine the rights of the parties under the law. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

Only issues of fact raised by the pleadings must be submitted to the jury. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

An issue of fact is raised for the determination of the jury whenever a material fact, which is one constituting a part of plaintiff's cause of action or defendant's defense, is alleged by one party and denied by the other. Sullivan v. Johnson, 3 N.C. App. 581, 165 S.E.2d 507 (1969), construing former § 1-198.

An issue of fact arises on the pleadings whenever a material fact is maintained by one part and controverted by the other. Wells v. Clayton, 236 N.C. 103, 72 S.E.2d 16 (1952); In re Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

A material fact is one which constitutes a part of the plaintiff's cause of action or the defendant's defense. Wells v. Clayton, 236 N.C. 103, 72 S.E.2d 16 (1952); In re Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966); Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

An issue of fact arises when the answer controverts a material allegation of the complaint. Baker v. Malan Constr. Corp., 255 N.C. 302, 121 S.E.2d 731 (1961).

Material Fact Not Denied Is Taken as True.—If a material fact alleged in the complaint is not denied by the answer, such allegation, for the purpose of the action, is taken as true and no issue arises therefrom. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

Courts look with favor on stipulations designed to simplify, shorten, or settle litigation and save cost to the parties, and such practice will be encouraged. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

Although the parties may not agree upon improper issues they may, by stipulation or judicial admission, establish any material fact which has been in controversy between them, and thereby eliminate the necessity of submitting an issue to the jury with reference to it. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

But stipulations do not dispense with necessity that pleadings support proof. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

The pleadings must support the judgment, which may not based on facts not alleged in the complaint and entirely inconsistent with it. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

The issues submitted together with the answers thereto must be sufficient to support a judgment disposing of the whole case. Griffin v. United Servs., Life Ins. Co., 225 N.C. 684, 36 S.E.2d 225 (1945), citing Tucker v. Satterthwaite, 120 N.C. 118, 27 S.E. 45 (1897); Coulbourn v. Armstrong, 243 N.C. 663, 91 S.E.2d 912 (1956).

When the facts constituting a waiver do not appear in the pleadings, the party relying thereon must specially plead the defense, and it must be pleaded with certainty and particularity and established by the greater weight of the evidence. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

Denial of Allegation of Wrongful Possession.—In an action to recover possession of personalty, defendant's denial of the allegation that she is in the wrongful possession raises an issue for the jury, since even though plaintiff be owner of the property, it does not follow that defendant is in the wrongful possession thereof. Coulbourn v. Armstrong, 243 N.C. 663, 91 S.E.2d 912 (1956).

Sufficiency of Verdict. — The verdict, whether in response to one or many issues, must establish facts sufficient to enable the court to proceed to judgment. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

Issues May Not Be Tendered or Objected to on Appeal.—If defendant has not tendered issues, or otherwise objected to trial on the issue submitted, it cannot do so on appeal. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

If the parties consent to the issues submitted, or do not object at the time or ask for different or additional issues, the objection cannot be made later. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

Section (a) is in accord with the case of State v. Ewing, 108 N.C. 755, 13 S.E. 10 (1891), and is approved as the better practice. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

Manner of Arriving at General Verdict.—In arriving at a general verdict, the jurors take the law as given by the court and apply the law to the facts as they find them to be, and reach a general conclusion, usually "guilty" or "not guilty." State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

Form of Special Verdict. — Ordinarily, the form of a special verdict is a written recital of the jury's findings of the ultimate material facts. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

It was originally a requirement in this jurisdiction that the special verdict state that the jury finds the accused guilty if, in the opinion of the court upon the facts found, he is guilty, and not guilty if, in the opinion of the court, the facts found do not establish guilt. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

A special verdict is in itself a verdict of guilty or not guilty, as the facts found in it do, or do not, constitute in law the offense charged. State v. Stewart, 91 N.C. 566 (1884). The procedure outlined in State v. Love, 238 N.C. 283, 77 S.E.2d 501 (1953), and cases tried in accordance with that procedure will not be held erroneous by reason of such procedure. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

And Court May Enter Judgment Thereon.—Upon the special verdict in a case, the court should simply declare its opinion that the defendant is guilty or not guilty, and enter judgment accordingly. Indeed, the simple entry of judgment in favor of or against the defendant would be sufficient. It is plain and convenient, will prevent further conflict of decision, and should be observed. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

If Material Facts Are Found No General Verdict Is Necessary.—Where there is a special verdict, finding the material facts, no general verdict of guilt or innocence is necessary. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964), citing State v. Ewing, 108 N.C. 755, 13 S.E. 10 (1891).

But Special Verdict Must Find Sufficient Facts to Permit Conclusion upon Which Judgment Rests.—A special verdict must find sufficient facts to permit of the conclusion of law upon which the judgment rests. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

A special verdict is defective if a material finding is omitted. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

In a prosecution for willful nonsupport of an illegitimate child, a verdict upon the issues of paternity and nonsupport, if resolved in favor of the State, is sufficient to support a judgment against defendant without a general verdict by the jury of guilty. This does not contravene the provisions of N.C. Const., Art. I, §§ 11 and 13, requiring trial and verdict by jury in criminal cases. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

The verdict of the jury on the issues of paternity and nonsupport is in the nature of a special verdict. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

(a) *When made; effect.*—A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order granting a motion for a directed verdict shall be effective without any assent of the jury.

(b) *Motion for judgment notwithstanding the verdict.*—

(1) Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the submission of the action to the jury shall be deemed to be subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. In

either case the motion shall be granted if it appears that the motion for directed verdict could properly have been granted. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the judge may allow the judgment to stand or may set aside the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the judge may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. Not later than ten (10) days after entry of judgment or the discharge of the jury if a verdict was not returned, the judge on his own motion may, with or without further notice and hearing, grant, deny, or redeny a motion for directed verdict made at the close of all the evidence that was denied or for any reason was not granted.

(2) An appellate court, on finding that a trial judge should have granted a motion for directed verdict made at the close of all the evidence, may not direct entry of judgment in accordance with the motion unless the party who made the motion for a directed verdict also moved for judgment in accordance with Rule 50 (b) (1) or the trial judge on his own motion granted, denied or redenied the motion for a directed verdict in accordance with Rule 50 (b) (1).

(c) *Motion for judgment notwithstanding the verdict—conditional rulings on grant of motion.*—

(1) If the motion for judgment notwithstanding the verdict, provided for in section (b) of this rule, is granted, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate division has otherwise ordered. In case the motion for new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate division.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) *Motion for judgment notwithstanding the verdict—denial of motion.*—If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate division concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate division reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted. (1967, c. 954, s. 1; 1969, c. 895, s. 11.)

Comment.—It will be recalled that Rule 41 (b) provides the procedure in those cases tried to the court where the party defending believes the evidence of his adversary is insufficient to permit a recovery. Section (a) of this rule provides the procedure in comparable circumstances in those cases tried by jury. It further provides a procedure whereby a claimant in a jury trial may urge that he is entitled to a recovery as a matter of law.

The rule contemplates that a party defending may move for a directed verdict at the close of his adversary's evidence or at the close of all the evidence whether or not he has made a prior motion. The rule further contemplates that any party may move for a directed verdict at the close of all the evidence.

Some important changes are effected by Rules 41 (a) and 50 (a) taken together. Formerly, a party defending had available the motion for nonsuit provided by former § 1-183. Judgment pursuant to a grant of the motion was not a judgment on the merits. In addition, any party had available the common-law motion for a directed verdict which does, if granted, result in a judgment on the merits. Everett v. Williams, 152 N.C. 117, 67 S.E. 265 (1910). Despite the greater potential of the directed verdict, the motion was infrequently employed because the claimant could always, under prior practice, forestall the directed verdict by taking a voluntary nonsuit.

Under the rules, at the close of the claimant's evidence, the party defending in a jury trial will be restricted to the directed verdict motion—a motion that if granted will result in a judgment on the merits disposing of the case finally in the absence of reversal on appeal. But it should be remembered that the judge will have power under Rule 41 (a) (2) on the claimant's motion to allow a dismissal that is not on the merits.

The last sentence in section (a) is simply for the purpose of avoiding a useless formality. When a judge decides that a directed verdict is appropriate, actually he is deciding that the question has become one exclusively of law and that the jury has no function to serve. In these circumstances, it is an idle gesture to require the jury to go through the motions of returning the verdict directed.

Section (b), providing for a motion for judgment notwithstanding the verdict or, as it is commonly called "a judgment NOV" (an abbreviation for non obstante veredicto) introduces an entirely new procedure to North Carolina practice. It is true that North Carolina had a judgment NOV of sorts—for use in a situation where the party against whom a verdict is rendered would have been entitled to a judgment on the pleadings. See McIntosh, *North Carolina Practice and Procedure* (1st ed.), § 612. The judgment NOV in this rule is an altogether different affair. In essence, it involves allowing a judge to consider the question of the sufficiency of the evidence after the jury has returned a verdict.

This power has been sought—unsuccessfully it must be said—by superior court judges on more than one occasion. See, e.g., Batson v. City Laundry Co., 202 N.C. 560, 163 S.E. 600 (1932); Jones v. Dixie Fire Ins. Co., 210 N.C. 559, 187 S.E. 769 (1936). A moment's reflection will show why. A motion challenging the sufficiency of the evidence will often present a close question of great difficulty. A jury verdict for the movant eliminates this question and an appeal based on the ruling on the motion. But under prior practice, the judge was not permitted to consider the question raised by the motion after submitting the case to the jury. He was required to rule, finally, before the case was submitted.

If the motion was granted, there would likely be an appeal. If the trial judge was affirmed, it was quite possible that the appeal was unnecessary since the jury, had it been allowed to consider the evidence, might well have found for the movant. If the trial judge was reversed, there would have to be a new trial, repeating much of the expenditure in time and effort that was put into the first trial because there was no verdict on which judgment could be entered.

Under the rule, whenever a motion for a directed verdict made at the close of all the evidence is not granted, it will be deemed that the judge submitted the case to the jury having reserved for later determination the legal question raised by the motion. Thus, if there is a verdict for the nonmovant or if for some reason a verdict is not returned, the judge can reconsider the sufficiency of the evidence and, if convinced that it is insufficient, can grant the motion. If, on appeal it should prove that the judge was correct, that is, that he properly granted the motion, then the appellate court can affirm and, in appropriate cases, order judgment entered for the movant. On the other hand, if it should prove that the trial judge improperly granted the motion, the appellate court is not restricted to granting a new trial, as under the prior practice, but can order judgment entered on the verdict.

The utility of the judgment NOV must be obvious. It will certainly eliminate some appeals and it will certainly eliminate some second trials.

Turning now to the procedure for employing the motion for judgment NOV, it will be observed that making an appropriate motion for a directed verdict is an absolute prerequisite for the motion for judgment NOV. 5 *Moore's Federal Practice*, § 50.08 and cases cited.

Second, it will be observed that the motion can, but need not be, coupled with a motion for a new trial. If it is joined with a motion for a new trial, the proper procedure, as laid down by the Supreme Court in Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 Sup. Ct. 189, 85 L. Ed. 147 (1940) and as spelled out in sections (c) and (d) is for the court to rule on both motions. If the motion for judgment is granted and this is approved on appeal, the lower court's ruling on the movant's (verdict loser's) motion for new trial becomes irrelevant. Final judgment for the movant is affirmed. If, however, the lower court is reversed on appeal as to the motion for judgment, then its ruling on the new trial motion becomes a matter of importance. If the movant (verdict loser) was granted a new trial, "the new trial shall proceed unless the appellate court has otherwise ordered." Of course, the appellate court might very well "otherwise order" since the nonmovant (verdict winner) could assert on appeal not only error in the grant of the motion for judgment but error in the grant of the new trial. If the movant was denied a new trial although granted a judgment NOV, he can, under section (c), "assert error in that denial" on appeal.

Section (d) deals with the situation where the motion for judgment is denied. The movant may have coupled with his motion a motion for new trial. If the new trial motion was also denied, then the movant could appeal in respect to both motions. If the appellate court reverses as to the motion for judgment, it can order judgment for the movant or a new trial as the case may be. If the appellate court affirms in respect to the motion for judgment, it may of course reverse or affirm in respect to the new trial motion.

Editor's Note. — The 1969 amendment rewrote section (b).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

Rule 51. Instructions to jury.

(a) *Judge to explain law but give no opinion on facts.*—In charging the jury in any action governed by these rules, no judge shall give an opinion whether a fact is fully or sufficiently proved, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. The judge shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided, the judge shall give equal stress to the contentions of the various parties.

(b) *Requests for special instructions.*—Requests for special instructions must be in writing, entitled in the cause, and signed by the counsel or party submitting them. Such requests for special instructions must be submitted to the judge before the judge's charge to the jury is begun. The judge may, in his discretion, consider such requests regardless of the time they are made. Written requests for special instructions shall, after their submission to the judge, be filed with the clerk as a part of the record.

(c) *Judge not to comment on verdict.*—The judge shall make no comment on any verdict in open court in the presence or hearing of any member of the jury panel; and if any judge shall make any comment as herein prohibited or shall praise or criticize any jury on account of its verdict, whether such praise, criticism or comment be made inadvertently or intentionally, such praise, criticism or comment by the judge shall for any party to any other action remaining to be tried constitute valid grounds as a matter of right for a continuance of any action to a time when all members of the jury panel are no longer serving. The provisions of this section shall not be applicable upon the hearing of motions for a new trial or for judgment notwithstanding the verdict. (1967, c. 954, s. 1.)

Comment.—The effort here, except for minor changes, has been to carry forward the substance of the present law. The prohibition on comment by the judge has been retained. His duty to charge has been retained. The automatic exception to any errors in respect to the charge, formerly contained in § 1-206, subsection (c), has been retained in Rule 46.

Rule 52. Findings by the court.

(a) *Findings.*—

(1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

(2) Findings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41 (b). Similarly, findings of fact and conclusions of law are necessary on the granting or denying of a preliminary injunction or any other provisional remedy only when required by statute expressly relating to such remedy or requested by a party.

(3) If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

(b) *Amendment.*—Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

(c) *Review on appeal.*—When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment, or a request for specific findings. (1967, c. 954, s. 1; 1969, c. 895, s. 12.

Comment. — This rule largely follows prior law, incorporating little of the federal rule. Former § 1-185 called for written findings and conclusions of law "upon trial of an issue of fact by the court." In respect to motions and provisional remedies, the Commission has been guided by the North Carolina case law. See Millhiser v. Balsley, 106 N.C. 433, 11 S.E. 314 (1890); Whitehead v. Hale, 118 N.C. 601, 24 S.E. 360 (1896). The reference to Rule 41 (b) has to do with the situation when the trial judge is dismissing an action at the close of the plaintiff's evidence with the determination that the dismissal shall be on the merits. In this situation, both Rules 41 and 52 contemplate that the judge shall make written findings and conclusions.

Editor's Note. — The 1969 amendment rewrote section (a).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

The cases cited in this note were decided under former §§ 1-184 and 1-185.

Waiver of a jury trial invests the trial judge with the dual capacity of judge and juror, and it is his duty to weigh the evidence, find the facts, and upon the conflicting inferences of causation of plaintiff's injuries, to draw the inferences; the ultimate issue is for him. Taney v. Brown, 262 N.C. 438, 137 S.E.2d 827 (1964).

The waiver of trial by jury invests the trial judge with the dual capacity of judge and juror. Hodges v. Hodges, 257 N.C. 774, 127 S.E.2d 567 (1962).

The effect of the submission to the judge is to invest him with the dual capacity of judge and juror. He is to hear the evidence and pass upon its competency and admissibility as judge, and determine its weight and sufficiency as juror. The rules as to the admission and exclusion of evidence are not so strictly enforced as in a jury trial. Everette v. D.O. Briggs Lumber Co., 250 N.C. 688, 110 S.E.2d 288 (1959).

The trial judge becomes both judge and juror. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Without Waiver Judge Cannot Enter Order Deciding Issue of Fact. — Where there is nothing in the record to indicate that petitioner and respondent have waived their constitutional and statutory right to have the issue of fact joined on the pleadings tried by a jury, and there is no question of reference, the judge had no authority to enter an order affirming the order of the assistant clerk of the superior court, which in effect was a determination by the judge of the issue of fact raised by the pleadings and a finding by him that money deposited in the office of the clerk of the superior court was funds belonging to a decedent and an order that said money be distributed to the administrator c.t.a. of her last will and testament. In re Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

A guardian ad litem and his attorney may waive jury trial. Blades v. Spitzer, 252 N.C. 207, 113 S.E.2d 315 (1960).

Waiver by Consent to Pay Additur. — While it may be suggested that the practice of additur deprives a defendant of his constitutional right to a jury trial, guaranteed by N.C. Const., Art. I, § 19, the obvious answer is that the defendant can waive that right, which he does when he consents to pay the additur, since in this State the parties to a civil action have a right to waive a jury trial. Caudle v. Swanson, 248 N.C. 249, 103 S.E.2d 357 (1958).

The judge who tries an issue of fact is required to do three things: (1) To find the facts on the issue of fact submitted to him; (2) to declare the conclusions of law arising on the facts found by him; and (3) to adjudicate the rights of the parties accordingly. Woodard v. Mordecai, 234 N.C. 463, 67 S.E.2d 639 (1951); Bradham v. Robinson, 236 N.C. 589, 73 S.E.2d 555 (1952); Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957); Morehead v. Harris, 255 N.C. 130, 120 S.E.2d 425 (1961).

Where a jury trial is waived by the parties to a civil action, the judge who tries the case is required to do three things: (1) To find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising upon the facts found; and (3) to enter judgment accordingly. Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

Duty of Judge to Consider and Weigh All Competent Evidence.—When trial by jury is waived, it is the trial judge's right and duty to consider and weigh all the competent evidence before him, giving to it such probative value as in his sound discretion and opinion it is entitled to. Hodges v. Hodges, 257 N.C. 774, 127 S.E.2d 567 (1962).

It is the duty of the trial judge to consider and weigh all competent evidence before him. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

And to Determine Its Weight and Credibility and Inferences to Be Drawn Therefrom.—When trial by jury is waived, it is the trial judge's province to determine the credibility of the witnesses and the weight to be attached to their testimony, and the inferences legitimately to be drawn therefrom, in exactly the same sense that a jury should do in the trial of a case. Hodges v. Hodges, 257 N.C. 774, 127 S.E.2d 567 (1962).

When a trial by jury is waived, and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial judge. Hodges v. Hodges, 257 N.C. 774, 127 S.E.2d 567 (1962).

The trial judge passes upon the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn therefrom. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

The trial judge determines which inferences shall be drawn and which shall be rejected if different inferences may be drawn from the evidence. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Findings of fact by the court have the force and effect of a verdict by a jury. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

There are two kinds of facts, ultimate facts and evidentiary facts. Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense. Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

Evidentiary facts are those subsidiary facts required to prove the ultimate facts. Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

The trial judge is required to find and state the ultimate facts only. Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts. The trial judge is required to find and state the ultimate facts only. Woodard v. Mordecai, 234 N.C. 463, 67 S.E.2d 639 (1951). See St. George v. Hanson, 239 N.C. 259, 78 S.E.2d 885 (1954); Reid v. Johnston, 241 N.C. 201, 85 S.E.2d 114 (1954).

The trial judge is required to find and state the ultimate facts only, and not the evidentiary or subsidiary facts required to prove the ultimate facts. Bridges v. Jackson, 255 N.C. 333, 121 S.E.2d 542 (1961).

In a trial by the court under agreement of the parties, the court is required to find and state only the ultimate facts. McCallum v. Old Republic Life Ins. Co., 262 N.C. 375, 137 S.E.2d 164 (1964).

Separate Conclusions of Facts and Law.—A judge of the superior court, in passing upon a mixed question of law and fact, should, as required by this section, state the facts found and the conclusions of law separately. Foushee v. Pattershall, 67 N.C. 453 (1872); Walker v. Walker, 204 N.C. 210, 167 S.E. 818 (1933). See also Harrison v. Brown, 222 N.C. 610, 24 S.E.2d 470 (1943); Woodard v. Mordecai, 234 N.C. 463, 67 S.E.2d 639 (1951); Bradham v. Robinson, 236 N.C. 589, 73 S.E.2d 555 (1952).

The judge complies with the requirement that he state his findings of fact and conclusions of law separately if he separates the findings and the conclusions in such a manner as to render them distinguishable, no matter how the separation is effected. Woodard v. Mordecai, 234 N.C. 463, 67 S.E.2d 639 (1951).

Where the parties waive jury trial and agree to trial by the court, it is preferable that the court make separate findings of fact and conclusions of law rather than render a verdict on issues submitted to itself. Wynne v. Allen, 245 N.C. 421, 96 S.E.2d 422 (1957).

The judge must state his findings of fact and conclusions of law separately. The judge complies with this requirement if he separates the findings and the conclusions in such a manner as to render them distinguishable, no matter how the separation is effected. Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

When trial by jury is waived and issues of fact are tried by the court, the court is required to give its decision with its findings of fact and conclusions of law stated separately. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Judge's Findings of Fact Are Conclusive.—Where the parties consent to trial by the court without a jury, the findings of the court are as conclusive as a verdict of the jury if supported by competent evidence. Poole v. Gentry, 229 N.C. 266, 49 S.E.2d 464 (1948); Town of Burnsville v. Boone, 231 N.C. 577, 58 S.E.2d 351 (1950); Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957); Everette v. D.O. Briggs Lumber Co., 250 N.C. 688, 110 S.E.2d 288 (1959).

Findings of fact by the court, when a jury trial has been waived by consent, will not be disturbed on appeal, if based upon competent evidence. Fish v. Hanson, 223 N.C. 143, 25 S.E.2d 461 (1943); Turnage Co. v. Morton, 240 N.C. 94, 81 S.E.2d 135 (1954); Reid v. Johnston, 241 N.C. 201, 85 S.E.2d 114 (1954).

Upon waiver of jury trial, the court's findings of fact have the force and effect of a verdict by jury. Textile Ins. Co. v. Lambeth, 250 N.C. 1, 108 S.E.2d 36 (1959); Sherrill v. Boyce, 265 N.C. 560, 144 S.E.2d 596 (1965).

When the parties to a civil action waive trial by jury, as they may do, and agree that the presiding judge may find the facts in respect to the issues of fact raised by the pleadings, his findings of fact have the force and effect of a verdict by a jury upon the issues involved. And his findings of fact are conclusive on appeal, if there is evidence to support them. State Trust Co. v. M & J Fin. Corp., 238 N.C. 478, 78 S.E.2d 327 (1953).

Where the parties waive a jury trial and there are no exceptions to the findings of fact by the judge, it will be presumed that they are supported by competent evidence, and are binding on appeal. Tanner v. Ervin, 250 N.C. 602, 109 S.E.2d 460 (1959).

When a trial by jury has been waived by the parties for the judge to find the facts his findings thereof are conclusive on appeal if there is evidence to support them. Yarborough v. Moore, 151 N.C. 116, 65 S.E. 763 (1909); Eley v. Atlantic Coast Line R.R., 165 N.C. 78, 80 S.E. 1064 (1914). See Fish v. Hanson, 223 N.C. 143, 25 S.E.2d 461 (1943); Priddy v. Kernersville Lumber Co., 258 N.C. 653, 129 S.E.2d 256 (1963).

Findings of fact by the court are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Failure of judge to sign his findings of fact and incorporate them into the formal judgment rendered in the cause does not render the judgment void, there being a substantial compliance with this section. Bradham v. Robinson, 236 N.C. 589, 73 S.E.2d 555 (1952).

Trial of Case on Agreed Statement of Facts.—See U Drive It Auto Co. v. Atlantic Fire Ins. Co., 239 N.C. 416, 80 S.E.2d 35 (1954).

Where the parties submit the cause upon stipulation of facts, the hearing is on the facts stipulated, and assignment of error for failure of the court to make certain requested findings of fact and conclusions of law is inapposite. Competitor

Liaison Bureau of Nascar v. Midkiff, 246 N.C. 409, 98 S.E.2d 468 (1957).

Findings Dictated by Judge to Reporter.—Where the judge dictates his findings to the court reporter and causes the reporter to transcribe them, it amounts to a finding of the facts by the judge in writing. Bradham v. Robinson, 236 N.C. 589, 73 S.E.2d 555 (1952).

Verdict on Issues Submitted by Court to Itself.—Except in a small claim action, it is irregular for the court, in a trial by the court under agreement of the parties, to render a verdict on issues submitted to itself. Anderson v. Cashion, 265 N.C. 555, 144 S.E.2d 583 (1965).

Unless the action is a small claim, it is irregular for the court to render a verdict on issues submitted to itself. Sherrill v. Boyce, 265 N.C. 560, 144 S.E.2d 596 (1965).

Judgment of Nonsuit. — Where, upon waiver of jury trial in accordance with this section, the court makes no specific findings of fact but enters judgment of involuntary nonsuit, the only question presented is whether the evidence, taken in the light most favorable to plaintiff, would support findings of fact upon which plaintiff could recover. Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957); DeBruhl v. L. Harvey & Son Co., 250 N.C. 161, 108 S.E.2d 469 (1959); Oldham & Worth v. Bratton, 263 N.C. 307, 139 S.E.2d 653 (1965).

Where cause is heard by the court by consent, its written judgment granting defendant's motion as of nonsuit is equivalent to a finding that all the evidence, considered in the light most favorable to plaintiffs, is insufficient to show facts entitling plaintiffs to recover on any issue raised by the pleadings, and is sufficient finding of facts by the court. Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach, 216 N.C. 778, 7 S.E.2d 13 (1940); Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957).

Sufficient Compliance.—See Woodard v. Mordecai, 234 N.C. 463, 67 S.E.2d 639 (1951).

Insufficient Compliance. — Statements of facts found by court held insufficient compliance with the requirement of this section. Jamison v. Charlotte, 239 N.C. 423, 79 S.E.2d 797 (1954).

No New Trial if Judgment Shows Findings and Legal Basis.—Where jury trial is waived and the court acts both as judge and jury, it is irregular for the court to render a verdict on issues submitted to itself, but in the absence of objection and exception, a new trial will not be ordered for this cause if from the judgment it can be determined what the court found the ultimate facts to be and what the legal basis of the judgment is. Daniels v. Nationwide Mut. Ins. Co., 258 N.C. 660, 129 S.E.2d 314 (1963).

Rule 53. Referees.

(a) *Kinds of reference.*—

(1) By consent.—Any or all of the issues in an action may be referred upon the written consent of the parties except in actions to annul a marriage, actions for divorce, actions for divorce from bed and board, actions for alimony without the divorce or actions in which a ground of annulment or divorce is in issue.

(2) Compulsory.—Where the parties do not consent to a reference, the court may, upon the application of any party or on its own motion, order a reference in the following cases:

a. Where the trial of an issue requires the examination of a long or complicated account; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein.

b. Where the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.

c. Where the case involves a complicated question of boundary, or requires a personal view of the premises.

d. Where a question of fact arises outside the pleadings, upon motion or otherwise, at any stage of the action.

(b) *Jury trial.*—

(1) Where the reference is by consent, the parties waive the right to have any of the issues within the scope of the reference passed on by a jury.

(2) A compulsory reference does not deprive any party of his right to a trial by jury, which right he may preserve by
  a. Objecting to the order of compulsory reference at the time it is made, and
  b. By filing specific exceptions to particular findings of fact made by the referee within 30 days after the referee files his report with the clerk of the court in which the action is pending, and
  c. By formulating appropriate issues based upon the exceptions taken and demanding a jury trial upon such issues. Such issues shall be tendered at the same time the exceptions to the referee's report are filed. If there is a trial by jury upon any issue referred, the trial shall be only upon the evidence taken before the referee.

(c) *Appointment.*—The parties may agree in writing upon one or more persons not exceeding three, and a reference shall be ordered to such person or persons in appropriate cases. If the parties do not agree, the court shall appoint one or more referees, not exceeding three, but no person shall be appointed referee to whom all parties in the action object.

(d) *Compensation.*—The compensation to be allowed a referee shall be fixed by the court and charged in the bill of costs. After appointment of a referee, the court may from time to time order advancements by one or more of the parties of sums to be applied to the referee's compensation. Such advancements may be apportioned between the parties in such manner as the court sees fit. Advancements so made shall be taken into account in the final fixing of costs and such adjustments made as the court then deems proper.

(e) *Powers.*—The order of reference to the referee may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the referee's report. Subject to the specifications and limitations stated in the order, every referee has power to administer oaths in any proceeding before him, and has generally the power vested in a referee by law. The referee shall have the same power to grant adjournments and to allow amendments to pleadings and to the summons as the judge and upon the same terms and with like effect. The referee shall have the same power as the judge to preserve order and punish all violations thereof, to compel the attendance of witnesses before him by attachment, and to punish them as for contempt for nonattendance or for refusal to be sworn or to testify. The parties may procure the attendance of witnesses before the referee by the issuance and service of subpoenas as provided in Rule 45.

(f) *Proceedings.*—

(1) Meetings.—When a reference is made, the clerk shall forthwith furnish the referee with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the referee shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the referee to proceed with all reasonable diligence. Any party, on notice to all other parties and the referee, may apply to the court for an order requiring the referee to expedite the proceedings and to make his report. If a party fails to appear at the time and place appointed, the referee may proceed ex parte, or, in his discretion, may adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Statement of Accounts.—When matters of accounting are in issue before the referee, he may prescribe the form in which the accounts shall be

submitted and in any proper case may require or receive in evidence a statement by a certified public accountant or other qualified accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the referee may require a different form of statement to be furnished, or the accounts of specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(3) Testimony Reduced to Writing.—The testimony of all witnesses must be reduced to writing by the referee, or by someone acting under his direction and shall be filed in the cause and constitute a part of the record.

(g) *Report.*—

(1) Contents and Filing.—The referee shall prepare a report upon the matters submitted to him by the order of reference and shall include therein his decision on all matters so submitted. If required to make findings of fact and conclusions of law, he shall set them forth separately in the report. He shall file the report with the clerk of the court in which the action is pending and unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. Before filing his report a referee may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions. The clerk shall forthwith mail to all parties notice of the filing.

(2) Exceptions and Review.—All or any part of the report may be excepted to by any party within 30 days from the filing of the report. Thereafter, and upon 10 days' notice to the other parties, any party may apply to the judge for action on the report. The judge after hearing may adopt, modify or reject the report in whole or in part, render judgment, or may remand the proceedings to the referee with instructions. No judgment may be rendered on any reference except by the judge. (1967, c. 954, s. 1; 1969, c. 895, s. 13.)

Comment.—Generally, the rules leave the reference practice as it was. But some changes are made.

Section (a). — The Commission has included all of the grounds for compulsory reference found in former § 1-189 except that providing for reference in actions "of which the courts of equity . . . had exclusive jurisdiction" prior to 1868.

Section (b). — In keeping with prior practice, the rule affirms the right of jury trial in compulsory reference cases. It goes further, and spells out, as former §§ 1-188 to 1-195 did not, just how the right of jury trial is to be preserved. The method of preserving jury trial is essentially the same as that required by the case law. See Bartlett v. Hopkins, 235 N.C. 165, 69 S.E.2d 236 (1952).

Section (c). — This section essentially makes no change.

Section (d). — The Commission thought it would be useful to include, as former §§ 1-188 to 1-195 did not, some details in respect to the compensation of referees.

Section (e).—The first sentence specifying the allowable flexibility in the order of reference is new. So far as the powers of the referee are concerned, they remain essentially unchanged except as enlarged by section (f).

Section (f).—Former §§ 1-188 to 1-195 contained no equivalent to subsection (2) but the Commission believes the new authority will be useful.

Section (g). — Here, for purposes of clarity, the rule goes into more detail than did former §§ 1-188 to 1-195 but the main outlines of the prior practice are retained.

Editor's Note. — The 1969 amendment rewrote subsection (1) of section (a).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act no significance shall be attached to the fact that this act was enacted at a later date."

The cases cited in this note were decided under former §§ 1-188 to 1-190, 1-194 and 1-195.

When Order of Reference Permitted.—No order of reference, either by consent or otherwise, should be permitted by the court until the pleadings are in and the parties are at issue. Crew v. Thompson, 266 N.C. 476, 146 S.E.2d 471 (1966).

Motion to Refer Must Be Timely.—The right of a party to move for compulsory reference is waived unless made before the jury has been empaneled, but the rule does not apply where reference is ordered by the court of its own motion. Shute v. Fisher, 270 N.C. 247, 154 S.E.2d 75 (1967).

The Court Has Discretionary Power to Grant or Refuse Reference.—The ordering or refusal to order a compulsory reference in an action which the court has authority to refer is a matter within the sound discretion of the court. Long v. Honeycutt, 268 N.C. 33, 149 S.E.2d 579 (1966).

In ordering a reference, the exact words of former § 1-189 were not required. Shute v. Fisher, 270 N.C. 247, 154 S.E.2d 75 (1967).

Order Not Permitted Until Parties Are at Issue.—No order of reference, either by consent or otherwise, should be permitted by the court until the pleadings are in and the parties are at issue. Crew v. Thompson, 266 N.C. 476, 146 S.E.2d 471 (1966).

When the parties agree upon a reference, the consent continues until the order is complied with by a full report, and the judge cannot revoke it without the consent of both parties. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

Plea in Bar Defeats Order of Reference.—When the answer raises a plea in bar, which if established would end the action, a compulsory order of reference cannot be properly ordered until such plea is decided. Commissioners v. White, 123 N.C. 534, 31 S.E. 670 (1898); Bank v. Fidelity & Deposit Co., 126 N.C. 320, 35 S.E. 588 (1900); Shute v. Fisher, 270 N.C. 247, 154 S.E.2d 75 (1967).

A reference should not be ordered when there is a plea in bar which, when determined, will completely dispose of the controversy; but unless the plea is sufficient, when established, to finally settle the entire controversy, it constitutes no basis for refusing to refer. Sledge v. Miller, 249 N.C. 447, 106 S.E.2d 868 (1959).

The plea of title by adverse possession is not such a plea in bar as will prevent a compulsory reference until after the determination of the plea when it appears that the very plea of adverse possession of lappage is based upon a complicated question of boundary. Champion Paper & Fibre Co. v. Lee, 216 N.C. 244, 4 S.E.2d 449 (1939).

In an action for trespass to try title, defendants' plea of the three-year statute as a bar to the recovery of damages for trespass and their plea of title by adverse possession under the seven, twenty, twenty-one and thirty-year statutes, did not constitute a plea in bar precluding reference since three-year statute would not determine the question of title and the pleas of the other statutes raised the very questions as to the boundaries justifying a reference under the statute. Sledge v. Miller, 249 N.C. 447, 106 S.E.2d 868 (1959).

Setting Aside Order of Reference.—Once the order of reference is made, and particularly after the report has been filed, it cannot be set aside except for good and sufficient cause assigned and made to appear to the court. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

In order for one superior court judge to set aside an order of compulsory reference entered by another, the motion would have to go to the validity and regularity of the proceeding or some subsequent change of circumstances affecting the status of the case. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

Parties Not Deprived of Jury Trial.—A compulsory reference does not deprive one of the right to trial by jury. Resort Dev. Co. v. Phillips, 3 N.C. App. 295, 164 S.E.2d 516 (1968).

A compulsory reference does not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial is only upon the written evidence taken before the referee. And the report of the referee, consisting of his findings of fact and conclusions of law, are incompetent as evidence before the jury. Moore v. Whitley, 234 N.C. 150, 66 S.E.2d 785 (1951). See Solon Lodge v. Ionic Lodge, 245 N.C. 281, 95 S.E.2d 921 (1957).

Preservation of Right to Jury Trial.—By objecting to the order of compulsory reference when entered, and by, after the referee's report was filed, filing in apt time exceptions to particular findings of fact made by the referee, tendering issues and demanding a jury trial on each issue tendered, defendants complied with procedural requirements to preserve their right to a jury trial. Farmers Cooperative Exchange v. Scott, 260 N.C. 81, 132 S.E.2d 161 (1963).

In order to preserve the right to trial by jury in a compulsory reference, a party must object to the order of reference at the time it is made, file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out by the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. Booker v. Highlands, 198 N.C. 282, 151 S.E. 635 (1930); Marshville Cotton Mills v. Maslin, 200 N.C. 328, 156 S.E. 484 (1931); Simmons v. Lee, 230 N.C. 216, 53 S.E.2d 79 (1949); Better Home Furniture Co. v. Baron, 243 N.C. 502, 91 S.E.2d 236 (1956).

In order to preserve his right to a jury trial in a compulsory reference where the referee's report is adverse to him, a party must comply with each of these procedural requirements: 1. He must object to the order of compulsory reference at the time it is made. 2. He must file specific exceptions to particular findings of fact made by the referee within thirty days after the referee delivers his report to the clerk of the court in which the action is pending. 3. He must formulate appropriate issues of fact raised by the pleadings and based on the facts pointed out in his exceptions, and tender such issues with his exceptions to the referee's report. 4. He must set forth in his exceptions to the referee's report a definite demand for a jury trial on each issue so tendered. Bartlett v. Hopkins, 235 N.C. 165, 69 S.E.2d 236 (1952).

Where a party objects to a compulsory reference, makes proper exceptions to the findings of fact and conclusions of law of the referee, and tenders the issue of title raised by the pleadings, he has preserved his right to trial by jury. Moore v. Whitley, 234 N.C. 150, 66 S.E.2d 785 (1951).

A party to a compulsory reference waives his right to a jury trial by failing to take the proper steps to save it. Bartlett v. Hopkins, 235 N.C. 165, 69 S.E.2d 236 (1952).

Where a party makes no demand in his exceptions to the referee's report for a jury trial on the issues tendered by him, he waives his constitutional right to have a jury determine the controverted issues of fact. Bartlett v. Hopkins, 235 N.C. 165, 69 S.E.2d 236 (1952).

Defendants, by not excepting to the order of compulsory reference when made and by proceeding with the trial before the referee, did not preserve the right to challenge the order upon the ground that it should not have been entered before an alleged plea of accord and satisfaction had been passed on, or any other plea in bar they may have alleged. Farmers Cooperative Exchange v. Scott, 260 N.C. 81, 132 S.E.2d 161 (1963).

When Exception to Refusal of Jury Trial Untenable. — Even though a party to a compulsory reference by proper exceptions and tender of issues preserves his right to jury trial upon the written evidence taken before the referee, if such evidence is insufficient to raise issues of fact, exception to the refusal of a jury trial is untenable. Nantahala Power & Light Co. v. Horton, 249 N.C. 300, 106 S.E.2d 461 (1959).

Purpose of Reference Where Right to Jury Trial Reserved.—When the reference is compulsory and the parties have reserved their rights to a jury trial, the practical purpose of the reference and the exceptions is to develop and specifically delimit the issues to be determined by a jury. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

The taking of an account must be necessary, and the accounting taken should have some direct relation to the ultimate disposition of the case. Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

What Constitutes a "Long Account".— A compulsory reference is not authorized on the ground that the trial requires the examination of long accounts in an action instituted to recover on a promissory note or an account where the receipt of each and every payment alleged to have been made thereon is admitted. Where numerous payments on an indebtedness have been made, the case involves only a matter of computation of figures and has none of the elements of a long account with charges and discharges, as contemplated in this section. Commercial Fin. Co. v. Culler, 236 N.C. 758, 73 S.E.2d 780 (1953). See Coin Mach. Acceptance Corp. v. Pillman, 235 N.C. 295, 69 S.E.2d 563 (1952).

Where an action involved purchases on account over a period of years, it could not be said that the action did not require the examination of a long account. Farmers Cooperative Exchange v. Scott, 260 N.C. 81, 132 S.E.2d 161 (1963).

To hear evidence requiring the examination of a long account involving the books and records of the defendant corporation, numerous calculations of interest, an examination of numerous exhibits, and the determination of the fair value of the stock of the corporation, would be the equivalent of the examination of a long account which would justify the order of reference. Shute v. Fisher, 270 N.C. 247, 154 S.E.2d 75 (1967).

It could not be said as a matter of law from reading the pleadings that plaintiff's cause of action did not require the consideration of a "long account." Long v. Honeycutt, 268 N.C. 33, 149 S.E.2d 579 (1966).

Issues of Fact and Law May Be Referred.—Under the provisions of former § 1-172, a judge was authorized to order a compulsory reference as to all of the issues, both of fact and of law. Resort Dev. Co. v. Phillips, 3 N.C. App. 295, 164 S.E.2d 516 (1968).

Appointment of Referee by Court. — Where the parties fail to agree upon a referee, the court may appoint a referee, and such appointment will not be disturbed when only one of the parties objects. Shute v. Fisher, 270 N.C. 247, 154 S.E.2d 75 (1967).

Referee Cannot Be Appointed to Attend and Determine Rights at Meeting.—It is not contemplated that a referee be appointed to attend a meeting, such as the annual meeting of the members of an association, and there make determinations relating to the respective rights of contesting parties during the progress of such meeting. Crew v. Thompson, 266 N.C. 476, 146 S.E.2d 471 (1966).

When Findings of Referee Are Conclusive.—The findings of fact of the referee, approved by the judge, are conclusive on appeal if there is any competent evidence to support them. Morpul, Inc. v. Mayo Knitting Mill, 265 N.C. 257, 143 S.E.2d 707 (1965).

On a consent reference, findings of fact made by a referee, in the absence of exceptions thereto, are conclusive on the hearings in the superior court as they are on appeal to the Supreme Court. The findings to which no exceptions are entered become in effect facts agreed. Keith v. Silvia, 233 N.C. 328, 64 S.E.2d 178 (1951). See Keith v. Silvia, 236 N.C. 293, 72 S.E.2d 686 (1952).

The continuance of the case and the allowance of time to file exceptions to the referee's report are matters within the discretion of the court. White v. Price, 237 N.C. 347, 75 S.E.2d 244 (1953).

Purpose of Exceptions Where Reference Is by Consent.—If the reference is by consent, the purpose of the exceptions is to bring the controversy into focus for the trial judge, who, in the exercise of his supervisory power may affirm, amend, modify, set aside, make additional findings, and confirm, in whole or in part, or disaffirm the report of a referee. This he may do, however, only in passing upon exceptions, for in the absence of exceptions to the factual findings of a referee, such findings are conclusive, and where no exceptions are filed, the case is to be determined upon the facts as found by the referee. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

Purpose of Exceptions Where Reference Is Compulsory and Right to Jury Trial Reserved.—When the reference is compulsory and the parties have reserved their rights to a jury trial, the practical purpose of the reference and the exceptions is to develop and specifically delimit the issues to be determined by a jury. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

The trial judge must act upon the report even in a compulsory reference where the right to the trial by jury has been preserved. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

The judge cannot affirm the report of the referee prior to the time for filing exceptions where there has been no waiver of the right to file them. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

Even when a report is set aside for cause, the order of reference is not thereby revoked; it continues. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

The judge does not have the power ex mero motu to vacate a report upon which no attack had been made by any of the parties; the authority must be exercised, if at all, in an orderly manner in accord with recognized rules of procedure. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

The judge of the superior court may affirm, amend, modify, set aside, confirm in whole or in part, or disaffirm the report of a referee, or he may make additional findings of fact and enter judgment on the report as thus amended. But this does not mean that the judge may, ex mero motu, vacate a report upon which no attack has been made by any of the parties. The authority must be exercised, if at all, in an orderly manner in accord with recognized rules of procedure. Keith v. Silvia, 233 N.C. 328, 64 S.E.2d 178 (1951). See Keith v. Silvia, 236 N.C. 293, 72 S.E.2d 686 (1952).

Discretion of Judge.—A judge of the superior court has a wide latitude of discretion over the report of a referee, with power to review, modify, confirm in whole or in part, or to set aside the report. Keith v. Silvia, 236 N.C. 293, 72 S.E.2d 686 (1952).

The report of the referee is under the control of the court, and the power of review is a broad one as the court may set aside, modify, or confirm it in whole or in part. Terrell v. Terrell, 271 N.C. 95, 155 S.E.2d 511 (1967).

When exceptions are taken to a referee's findings of fact and law, it is the duty of the judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases—use his own faculties in ascertaining the truth, and form his judgment as to fact and law. This is required not only as a check upon the referee and a safeguard against any possible error on his part, but because he cannot review the referee's findings in any other way. Terrell v. Terrell, 271 N.C. 95, 155 S.E.2d 511 (1967).

When an action came on to be heard on exceptions to a referee's report, the judge of the superior court had authority to affirm in whole or in part, amend, modify, or set aside the report of the referee, or he could make additional findings of fact and enter judgment on the report as amended by him. Hall v. City of Fayetteville, 248 N.C. 474, 103 S.E.2d 815 (1958).

Additional Matters Incorporated in Report.—The fact that the referee in an action to determine title to land, in addition to entering findings of fact, conclusions of law and his decision, also incorporates in his report an analysis of the statement of contentions of the parties, a summary of the evidence relating to each contention, and his view of the law, was not prejudicial. McCormick v. Smith, 246 N.C. 425, 98 S.E.2d 448 (1957).

Time of Filing Exceptions.—Where motion to remove the referee is made prior to the time his report is filed, and an appeal is taken from the granting of the motion, the superior court, upon the certification of the decision of the Supreme Court, reversing the judgment, has discretionary power to allow the filing of exceptions to the report, even though the report was filed prior to the hearing of the motion for removal. Keith v. Silvia, 236 N.C. 293, 72 S.E.2d 686 (1952).

Motion for Voluntary Nonsuit Does Not Preclude Filing of Exceptions.—Motion by plaintiff for voluntary nonsuit before the referee appointed to hear the cause does not preclude her from filing exceptions to the referee's report. Crowley v. McDougald, 241 N.C. 404, 85 S.E.2d 377 (1955).

Premature Entry of Judgment. — Where the record discloses that judgment confirming the report of a referee was entered at a term of court convening before the expiration of the 30-day period for filing exceptions, and the record discloses no waiver of the right to file exceptions at any time during the 30-day period, the premature entry of judgment of confirmation is error appearing on the face of the record. Crowley v. McDougald, 241 N.C. 404, 85 S.E.2d 377 (1955).

An action on a note given to finance an automobile, in which all payments alleged by defendant are admitted by plaintiff, does not involve a long account with charges and discharges and is not subject to compulsory reference, notwithstanding further counterclaims for usury and damage for the mortgagee's alleged breach of his agreement to procure insurance on the car. Commercial Fin. Co. v. Culler, 236 N.C. 758, 73 S.E.2d 780 (1953).

Action on Conditional Sales Contract.—In an action to recover a specified sum and interest alleged to be due and owing to the plaintiff as the holder in due course of a conditional sales contract alleged to have been executed and delivered by the defendant, in which action no equitable relief is sought, the lower court has no power to authorize a compulsory reference. Coin Mach. Acceptance Corp. v. Pillman, 235 N.C. 295, 69 S.E.2d 563 (1952).

Processioning Proceeding. — A controversy by stipulation of the parties that boundary only was involved became, in effect, a processioning proceeding and was properly referred. Harrill v. Taylor, 247 N.C. 748, 102 S.E.2d 223 (1958).

A case involving a complicated question of boundary which required a personal view of the premises was a proper case for a compulsory reference. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

When Decisions Reviewable.—There is no ground for exception on appeal unless action by the judge is not supported by sufficient evidence, or error has been committed in receiving or rejecting testimony upon which it is based. Caudell v. Blair, 254 N.C. 438, 119 S.E.2d 172 (1961).

Appeal.—As a rule no appeal may be taken until the reference is completed and a final judgment rendered; but in a compulsory reference ordered against objection when a plea in bar has been interposed or when the parties demand a jury trial, the party objecting has the option to appeal at once, or to note an exception, proceed with the trial before the referee and have the exception considered on appeal from the final judgment. Resort Dev. Co. v. Phillips, 3 N.C. App. 295, 164 S.E.2d 516 (1968).

ARTICLE 7.

Judgment.

Rule 54. Judgments.

(a) *Definition.*—A judgment is either interlocutory or the final determination of the rights of the parties.

(b) *Judgment upon multiple claims or involving multiple parties.*—When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) *Demand for judgment.*—A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. (1967, c. 954, s. 1.)

Comment. — *Section (a).* — This section carries forward the definition of a judgment formerly contained in § 1-208.

Section (b). — These rules, with their liberalized provisions for expanding the size of a lawsuit, make it highly desirable in the multi-party and multi-claim lawsuit that there be provision for expediting appeals, in certain instances, from rulings terminating the litigation in respect to fewer than all the parties or all the claims. Otherwise, it may well be, if the aggrieved party must delay his appeal until all parties and claims have been disposed of, that the delay will be intolerable. On the other hand, there may be cases which should be presented in their entirety to the appellate court even at the price of delaying one party or another.

In considering this section, it should be remembered that § 1-277 was left intact except as it is modified by this section. In other words, appeals will continue to lie only when a "party aggrieved" has been deprived of a "substantial right," or from a final judgment. The modification here is that when there is no just reason for delay and when there is an express determination to that effect, the unit to which the finality concept shall be applied is by this rule made a smaller one. Thus, if two claims are presented to the trial court and one of them is the subject of a disputed ruling, an appeal will lie if the ruling would have been appealable in an action involving that claim alone and if the judge makes the requisite determination.

Conversely, in the absence of a determination by the trial judge, it is clear that there can be no appellate review irrespective of the nature of the ruling of the trial court, unless elsewhere expressly authorized. Section 1-277 is not such an express authorization. Thus, it will be seen that in the absence of a determination by the trial judge, a lawyer can safely delay in prosecuting his appeal. When there is such a determination, the situation will not be as clear. There must be in addition either a final judgment or a ruling affecting a "substantial right" for an appeal to lie. When these conditions obtain has not heretofore been altogether clear, and will not be under these rules. The only course of safety will be to press for review.

Section (c).—This section is a restatement of prior law.

Editor's Note.—For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1 (1969).

Definition of Interlocutory Order.—A judgment is interlocutory when subject to change by the court, during the pendency of the action, to meet the exigencies of the case. Skidmore v. Austin, 261 N.C. 713, 136 S.E.2d 99 (1964), decided under former § 1-208.

It is not proper to enter a partial judgment on the pleadings for a part of a litigant's claim, leaving controverted issues of fact relating to other parts of such claim open for subsequent trial. Erickson v. Starling, 235 N.C. 643, 71 S.E.2d 384 (1952), decided under former § 1-208.

Rule 55. Default.

(a) *Entry.*—When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) *Judgment.*—Judgment by default may be entered as follows:

(1) By the Clerk.—When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

In all cases wherein, pursuant to this rule, the clerk enters judgment by default upon a claim for debt which is secured by any pledge, mortgage, deed of trust or other contractual security in respect of which foreclosure may be had, or upon a claim to enforce a lien for unpaid taxes or assessments under G.S. 105-414, the clerk may likewise make all further orders required to consummate foreclosure in accordance with the procedure provided in article 29A of chapter 1 of the General Statutes, entitled "Judicial Sales."

(2) By the Judge.—In all other cases the party entitled to a judgment by default shall apply to the judge therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian ad litem or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the judge to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to take an investigation of any other matter, the judge may conduct such hearings or order such references as he deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by the Constitution or by any statute of North Carolina.

(c) *Service by publication or without the State.*—When service of the summons has been made by published notice, no judgment shall be entered on default until the plaintiff shall have filed a bond, approved by the court, conditioned to abide such order as the court may make touching the restitution of any property collected or obtained by virtue of the judgment in case a defense is thereafter permitted and sustained; provided, that in actions involving the title to real estate or to foreclosure mortgages thereon such bond shall not be required.

(d) *Setting aside default.*—For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60 (b).

(e) *Plaintiffs, counterclaimants, cross claimants.*—The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a crossclaim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54 (c).

(f) *Judgment against the State of North Carolina.*—No judgment by default shall be entered against the State of North Carolina or an officer in his official capacity or agency thereof unless the claimant establishes his claim or right to relief by evidence. (1967, c. 954, s. 1.)

Comment.—The State statutes presented a hodgepodge. Although former § 1-211 purported by its literal terms to give an exclusive listing of all the cases in which judgment by default final might be given, there were various other authorizations for such judgments scattered throughout the procedural and substantive sections. Section 1-212 then purportedly rounded out the scheme by providing that in all other cases "except those mentioned in § 1-211," judgment by default and inquiry might be given. This was obviously in literal conflict with all sections other than former § 1-211 which specifically authorized judgment by default final.

Although failure to file appropriate responsive pleading to a claim for affirmative relief is the usual basis for default judgment, other grounds appear: e.g. failure to file required bonds (former § 1-211 4 and § 1-525), failure to comply with pretrial discovery orders (former §§ 1-568.19, 8-89), and filing of "frivolous" pleadings (former § 1-219).

By § 1-209, clerks of superior court were authorized to enter all judgments by default authorized generally by § 1-209, and former §§ 1-211 and 1-213. This jurisdiction given clerks is concurrent with that of the superior court judge. Moody v. Howell, 229 N.C. 198, 49 S.E.2d 233 (1948). But some of the other scattered statutes authorizing judgments by default apparently contemplate that in the specific situations dealt with only the judge may enter judgment (e.g. § 1-525). Where the concurrent jurisdiction existed however, the appellate jurisdiction of the superior court judge as to the clerk's entry of judgment was retained (former § 1-220).

Although not made plain in the statutes, it has been held that though there is a "right" to a judgment upon default, the court may always in the exercise of its discretion allow time to answer when motion for judgment by default is made. Kruger v. Bank of Commerce, 123 N.C. 16, 31 S.E. 270 (1898). And of course, such judgments, as others, may be set aside after entry either by the clerk who entered them (former § 1-220), or by any appropriate judge for the usual reasons, i.e., excusable neglect, mistake, surprise, etc.

The main infirmities in the prior North Carolina practice as codified were thought to be (1) a general lack of symmetry and orderliness in the style and pattern of the various statutes, and (2) as a matter of substance, too much power and too much readiness in clerks to enter judgments which may thereafter be hard to set aside.

Accordingly, it was felt that federal Rule 55, with some few modifications to accommodate certain actions found in state practice and not in federal should be adopted, partially supplanting certain of the statutes which dealt with default judgments.

The federal rule approach actually contemplates a two-stage approach to judgment by default: The entry of default by the clerk; and thereafter the entry of judgment by default. Federal Rule 55 (b) (1) provides that the clerk may only enter judgments by default in a very limited context, when (a) the claim is for a sum certain or for a computable sum, and (b) the default is for want of appearance, and (c) the defaulting party is neither an infant nor incompetent. This approach of limiting the clerk's power to the purely ministerial functions of (a) making entry of default in all cases, and (b) entering judgment itself in only this very limited context is felt to be wise.

The basic federal scheme continues by providing in 55 (b) (2) that in all other cases than the very limited area spelled out in 55 (b) (1), judgment itself may only be entered by the judge. Thus, in all cases where (a) the claim is not for a sum certain or computable, or (b) the defaulting party has appeared, or (c) the defaulting party is an infant or incompetent, only the judge may actually enter judgment. And except where the defaulting party has made no appearance, he must be given notice, and the entry of the judgment is in all instances in the discretion of the judge. It is believed that deliberately pointing up the discretionary nature of this power to enter judgment by default at this stage is wise, and will result in an overall saving of time by prompting full inquiry into the matter at the pre-entry stage rather than, as under prior practice, having discretion in the matter exercised usually after judgment has already been entered.

Note next that the delineation between judges' and clerks' power is not the delineation between judgments by "default final" and those by "default and inquiry." This distinction indeed is not retained in literal terms in the federal rule pattern. Obviously those very limited judgments within the power of the clerk to enter are judgments by default final. But the judge may enter either type under 55 (b) (2). Instead of using this terminology, however, the rule as presented approaches the matter pragmatically by providing that when in order to enter final judgment something further must be done after entry of default, e.g. when an account must be taken or a jury trial had on an issue of damages or any other, the judge orders that done which is necessary. Thus, there is no intermediate judgment by "default and inquiry," but an entry of default in all cases and a final judgment by default entered only after everything required to its entry has been done. The same conceptions were involved in former § 1-212.

Section (c).—The Commission here attempted to take abundant precaution to protect the nonappearing defendant.

Section (d).—This section provides for setting aside default entries and judgments by default and ties the basis therefor into Rule 60 (b) providing generally for setting aside judgments. Former § 1-220 and existing case law expressed this conception so that this involves no real change.

Section (e).—This section makes it plain that the general provisions of the rule apply as well to defendants and third-party plaintiffs as to plaintiffs seeking affirmative relief. This conception was expressed less artfully in former § 1-213 as to defendants and North Carolina actually had no express provision for default judgments in favor of third-party plaintiffs, or crossclaims. This is necessary now particularly in view of the third-party practice liberalization provided in other rules.

Section (f).—This section seems to be self-explanatory.

A default judgment admits only the averments in the complaint, and the defendant may still show that such averments are insufficient to warrant the plaintiff's recovery. Lowe's of Raleigh, Inc. v. Worlds, 4 N.C. App. 293, 166 S.E.2d 517 (1969), decided under former § 1-211.

A complaint which fails to state a cause of action is not sufficient to support a default judgment for plaintiff. Lowe's of Raleigh, Inc. v. Worlds, 4 N.C. App. 293, 166 S.E.2d 517 (1969), decided under former § 1-211.

Where judgment by default is irregularly and improvidently entered by the assistant clerk of the superior court, the clerk of the superior court has authority to vacate the same upon motion in the cause. Booker v. Porth, 1 N.C. App. 434, 161 S.E.2d 767 (1968), decided under former § 1-211.

Rule 56. Summary judgment.

(a) *For claimant.*—A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.*—A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.*—The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) *Case not fully adjudicated on motion.*—If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established.

(e) *Form of affidavits; further testimony; defense required.*—Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable.*—Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.*—Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees. (1967, c. 954, s. 1.)

Comment.—While it has long been urged in North Carolina, see Chadbourn, *A Summary Judgment Procedure for North Carolina*, 14 N.C.L. Rev., 211 (1936), and while, in one form or another, it has been adopted in a majority of the states, the procedure provided by this rule is wholly new to North Carolina. It adds a powerful new weapon for the just, swift and efficient disposition of claims or defenses patently without merit. The rule provides a device whereby it can expeditiously be determined whether or not there exists between the parties a genuine issue as to any material fact. It is not the purpose of the rule to resolve disputed material issues of fact but rather to determine if such issues exist.

Under prior procedure, if the pleadings disclosed an issue of fact, a trial was generally necessary even though there might in actuality be no genuine dispute at all as to the facts. It was enough if the issue was formally raised by the pleadings. Significantly, however, the code drafters were well aware that there might indeed be no issue of material fact present even though the pleadings appeared to present one. They thus provided that sham and irrelevant defenses could be stricken, former § 1-126, that irrelevant and redundant matter might be stricken, former § 1-153, and that a frivolous demurrer, answer or reply might be disregarded, former § 1-219. But, for reasons that need not be examined here, these devices have not proved equal to the task of identifying those claims or defenses in which there was no genuine dispute as to a material fact.

The great merit of the summary judgment is that it does provide a device for identifying the factually groundless claim or defense. It does so by enabling the parties to lay before the court materials extraneous to the pleadings. If these materials reveal any dispute as to a material fact, summary judgment is precluded. But as section (e) makes clear, a party cannot necessarily rely on the pleadings to show the existence of such a dispute.

The operation of the rule can be illustrated by supposing an action to recover damages for personal injuries. The sole defense offered is that the plaintiff's exclusive remedy is afforded by the Workmen's Compensation Act. The plaintiff moves for summary judgment, supporting his motion with affidavits which on their face show that the act is inapplicable to the defendant's enterprise. At the hearing on the motion, the defendant can forestall summary judgment simply by producing an affidavit, deposition or interrogatory or oral testimony tending to show that he does come under the act. If, on the other hand, he does nothing, entry of partial summary judgment, leaving for later jury determination the amount of damages, can be entered against him. He has failed to show that there is a genuine issue as to any material fact except damages.

The defendant might also move for a summary judgment in the case supposed. If he shows, without any contrary showing by the plaintiff, that the act applies, then it would be appropriate to enter judgment for the defendant. Of course, section (f) permits the refusal of the motion when a party presents reasons for his inability to present affidavits opposing the motion.

It will be observed that section (e) requires that supporting and opposing affidavits "shall be made on personal knowledge" and "shall set forth such facts as would be admissible in evidence."

Editor's Note.—For article on the new summary judgment rule in North Carolina, see 5 Wake Forest Intra. L. Rev. 87 (1969).

Rule 57. Declaratory judgments.

The procedure for obtaining a declaratory judgment pursuant to article 26, chapter 1, General Statutes of North Carolina, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a prompt hearing of an action for a declaratory judgment and may advance it on the calendar. (1967, c. 954, s. 1.)

Comment.—This rule tracks the language of federal Rule 57, changed only by reference to the state statutory law, which spells out in detail the scope, procedure for obtaining, and effect of declaratory judgment. The comparable federal statutory law is 28 U.S.C.A. §§ 2201, 2202 a much more general statute than the state statute. The North Carolina Declaratory Judgment Act, to which reference is made, is essentially the Uniform Declaratory Judgment Act. The Commission felt that except for one minor change in respect of jury trial, the need for which is developed below, it should retain this basic statutory law and not substitute the more general federal type formulation. Professor Borchard, father of both, felt that state declaratory judgment acts should be more specific and detailed than the basic federal statutory authority needed to be. This separate practice rule simply refers to the basic act and in effect says (what is perhaps not strictly necessary in view of the coverage rule, Rule 1) that action for this relief as other actions shall be governed by these rules.

This rule does also make specific the right to jury trial as in other actions. Although this reflects a background of separate law and equity administration with resulting problems of jury right in the federal system in "new" kinds of actions, problems not presented in the North Carolina completely fused code practice, it does no harm to leave in this reference. Indeed, the North Carolina act itself, in § 1-261, states the basic right to jury trial of fact issues in this type of action.

The provision that, "The existence of another adequate remedy does not preclude a judgment for declaratory relief . . ." merely states more plainly and bolsters what is implicit in the act itself when in § 1-253 it is provided that the power to grant declaratory relief exists "whether or not further relief is or could be claimed." The federal act contains similar language in § 2201, but the federal rules draftsman thought it expedient to solidify this in the rule itself. No reason appears to depart from this. The critical substantive point here is that this language preserves the discretionary right of the court when asked to declare rights to decline to do so, possibly on the basis of existence of another remedy, but not necessarily to do so.

The provision for advancing trial of declaratory actions seems wise and would not apparently violate any State procedural customs or rules, within which peremptory settings are familiar practice.

Rule 58. Entry of judgment.

Subject to the provisions of Rule 54 (b): Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.

In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.

In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof. (1967, c. 954, s. 1.)

Comment.—Entry of judgment, as distinguished from rendition of judgment, is a critical moment under these rules. Time periods for the filing of certain motions are keyed to the moment of entry. It is therefore highly desirable that the moment of entry of judgment be easily identifiable and it is also desirable that fair notice be given all parties of the entry of judgment. The rule is drawn to achieve these objectives.

The first paragraph deals with the simple case when judgment is rendered in open court. Presumably all parties will have notice. There is no necessity for the judge to sign the judgment. This is in keeping with prior law. See former § 1-205. Of course, the rule recognizes in the judge a power to give a "contrary direction" to that contained in the rule. Accordingly, if a lawyer wishes the judgment to incorporate particular matters, or to be delayed, he may make a motion to this effect.

The second paragraph deals with the more complex judgment but again one rendered in open court. Here approval by the judge of the form of the judgment filed is necessary. Presumably, he would indicate this approval by signing the judgment but this approval is not necessary to the "entry" of judgment.

The third paragraph deals with all judgments, simple or not, "not rendered in open court." In such cases, specific notice is required to be given before a judgment will be deemed to have been entered.

Rule 59. New trials; amendment of judgments.

(a) *Grounds.*—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:

(1) Any irregularity by which any party was prevented from having a fair trial;

(2) Misconduct of the jury or prevailing party;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;

(5) Manifest disregard by the jury of the instructions of the court;

(6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;

(8) Error in law occurring at the trial and objected to by the party making the motion, or

(9) Any other reason heretofore recognized as grounds for new trial.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) *Time for motion.*—A motion for a new trial shall be served not later than 10 days after entry of the judgment.

(c) *Time for serving affidavits.*—When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 30 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On initiative of court.*—Not later than 10 days after entry of judgment the court of its own initiative, on notice to the parties and hearing, may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) *Motion to alter or amend a judgment.*—A motion to alter or amend the judgment under section (a) of this rule shall be served not later than 10 days after entry of the judgment. (1967, c. 954, s. 1.)

Comment.—*Section (a).*—Here, in listing the grounds for new trial, the rule goes beyond the prior statutory law as set forth in former § 1-207 to include all those grounds for new trial which have been approved by North Carolina case law. Former § 1-207 made express mention of only three grounds for new trial—exceptions, insufficient evidence, and excessive damages. But the court has approved new trial in a number of other situations: Where the damages are inadequate, Hinton v. Cline, 238 N.C. 136, 76 S.E.2d 162 (1953); where the verdict is defective, Vandiford v. Vandiford, 215 N.C. 461, 2 S.E.2d 364 (1939); where there is misconduct of or affecting the jury, In re Will of Hall, 252 N.C. 70, 113 S.E.2d 1 (1960); Keener v. Beal, 246 N.C. 247, 98 S.E.2d 19 (1957); where there is newly discovered evidence, Crissman v. Palmer, 225 N.C. 472, 35 S.E.2d 422 (1945); where there are irregularities in the trial, Lupton v. Spencer, 173 N.C. 126, 91 S.E. 718 (1917); where there is surprise, Hardy v. Hardy, 128 N.C. 178, 38 S.E. 815 (1901); when equity and justice so require, Walston v. Greene, 246 N.C. 617, 99 S.E.2d 805 (1957).

Section (b).—Here there is a new requirement as to the time within which a motion for new trial must be made. It will be observed that the time is keyed to the "entry of judgment." As to what constitutes "entry of judgment," see Rule 58.

Section (c). — While the practice prescribed here did not previously enjoy statutory sanction, a similar practice had been approved by the court. See Brown v. Town of Hillsboro, 185 N.C. 368, 117 S.E. 41 (1923); Allen v. Gooding, 174 N.C. 271, 93 S.E. 740 (1917).

Section (d).—Again, no prior statute is comparable to the section, but the Commission believes the practice has been approved by the Supreme Court. See Walston v. Greene, 246 N.C. 617, 99 S.E.2d 805 (1957).

Section (e). — This section would seem to be self-explanatory.

Rule 60. Relief from judgment or order.

(a) *Clerical mistakes.*—Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.*—On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b);

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this section does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action.

(c) *Judgments rendered by the clerk.*—The clerk may, in respect of judgments rendered by himself, exercise the same powers authorized in sections (a) and (b). The judge has like powers in respect of such judgments. Where such powers are exercised by the clerk, appeals may be had to the judge in the manner provided by law. (1967, c. 954, s. 1.)

Comment.—The prior North Carolina law was that the court could correct clerical mistakes at any time by motion in the cause, either in or out of term. The motion to correct a clerical error need not be made to the same judge who tried the cause.

There were two statutes dealing with the subject matter. Former § 1-220 provided in effect that where there had been personal service upon the defendant the court could set aside a judgment for mistake, surprise, inadvertence or excusable neglect within one year from the rendition of the judgment. Section 1-108 formerly provided in effect that where there had been constructive service only the defendant must be allowed to defend even after judgment at any time within one year after notice of the judgment but within five years after rendition of the judgment. In any such case the judge must find the facts concerning the mistake, surprise, etc., and that the defendant had a meritorious defense and he must reduce this information to writing.

In reference to section (b) (3) of the federal rule, North Carolina makes a distinction in extrinsic and intrinsic fraud and in the manner in which such judgment may be attacked.

There is not as much difference between the federal rule and the North Carolina as first blush would indicate. Actually, the federal rule uses very succinct language to incorporate most of the results obtained under the North Carolina statutes and case law. As noted above the prior North Carolina practice distinguished between the rights of a defendant who was personally served and a defendant against whom constructive notice was served.

Editor's Note.—The cases cited in this note were decided under former § 1-220.

Former § 1-220 was not applicable to proceedings before the Industrial Commission, because the Industrial Commission is not a court of general jurisdiction. It has no jurisdiction except that conferred upon it by statute. Hartsell v. Pickett Cotton Mills, 4 N.C. App. 67, 165 S.E.2d 792 (1969).

A party must show excusable neglect and a meritorious defense to be entitled to have the judgment set aside. Sawyer v. Sawyer, 1 N.C. App. 400, 161 S.E.2d 625 (1968).

In order to have a judgment set aside under this section, the movant must show excusable neglect. Meir v. Walton, 2 N.C. App. 578, 163 S.E.2d 403 (1968).

The absence of a sufficient showing of excusable neglect renders the question of meritorious defense immaterial. Ellison v. White, 3 N.C. App. 235, 164 S.E.2d 511 (1968).

And a want of a sufficient showing of a meritorious defense renders the question of excusable neglect immaterial. Ellison v. White, 3 N.C. App. 235, 164 S.E.2d 511 (1968).

Whether the neglect is excusable is to be determined with reference to the litigant's neglect, and not that of his attorney, or a defendant's insurer. Ellison v. White, 3 N.C. App. 235, 164 S.E.2d 511 (1968).

Where a defendant engages an attorney and thereafter diligently confers with the attorney and generally tries to keep informed as to the proceedings, the negligence of the attorney will not be imputed to the defendant. If, however, the defendant turns a legal matter over to an attorney upon the latter's assurance that he will handle the matter, and then the defendant does nothing further about it, such neglect will be inexcusable. Meir v. Walton, 2 N.C. App. 578, 163 S.E.2d 403 (1968).

Determination by Court. — Upon the facts found the court determines, as a matter of law, whether or not they constitute excusable neglect, and whether or not they show a meritorious defense; and from such ruling either party may appeal. Ellison v. White, 3 N.C. App. 235, 164 S.E.2d 511 (1968).

Attention Required by Parties Duly Served with Summons.—Parties who have been duly served with summons are required to give their defense that attention which a man of ordinary prudence usually gives his important business, and failure to do so is not excusable. Meir v. Walton, 2 N.C. App. 578, 163 S.E.2d 403 (1968); Ellison v. White, 3 N.C. App. 235, 164 S.E.2d 511 (1968).

The client may not abandon his case on employment of counsel, and when he has a case in court he must attend to it. Meir v. Walton, 2 N.C. App. 578, 163 S.E.2d 403 (1968).

Facts Insufficient to Support Conclusion of Excusable Neglect.—If the facts are insufficient to support the conclusion of excusable neglect, an order setting aside the judgment will be reversed. Ellison v. White, 3 N.C. App. 235, 164 S.E.2d 511 (1968).

Rule 61. Harmless error.

No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right. (1967, c. 954, s. 1.)

Comment.—The substance of this rule has been many times endorsed by the court. See e.g., Collins v. Lamb, 215 N.C. 719, 2 S.E.2d 863 (1937).

Rule 62. Stay of proceedings to enforce a judgment.

(a) *Automatic stay; exceptions—injunctions and receiverships.* — Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of section (c) govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) *Stay on motion for new trial or for judgment.*—In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52 (b).

(c) *Injunction pending appeal.*—When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(d) *Stay upon appeal.*—When an appeal is taken, the appellant may obtain a stay of execution, subject to the exceptions contained in section (a), by proceeding in accordance with and subject to the conditions of G.S. 1-289, G.S. 1-290, G.S. 1-291, G.S. 1-292, G.S. 1-293, G.S. 1-294, and G.S. 1-295.

When stay is had by giving supersedeas bond, the bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal as the case may be, and stay is then effective when the supersedeas bond is approved by the court.

(e) *Stay in favor of North Carolina or agency thereof.*—When an appeal is taken by the State of North Carolina or an officer in his official capacity or agency thereof or by direction of any department or agency of the State of North Carolina and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) *Power of appellate court not limited.*—The provisions of this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(g) *Stay of judgment as to multiple claims or multiple parties.*—When a court has ordered a final judgment under the conditions stated in Rule 54 (b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered. (1967, c. 954, s. 1.)

Comment.—While in general this rule leaves the present North Carolina law intact in this area, it does make some specific provisions in order to tie in the procedure here employed to other rules.

Rule 63. Disability of a judge.

If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then those duties may be performed:

(1) In actions in the superior court by the judge senior in point of continuous service on the superior court regularly holding the courts of the district. If such judge is himself under a disability, then the resident judge of the district senior in point of service on the superior court may perform those duties. If a resident judge, while holding court in his own district suffers disability and there is no other resident judge of the district, such duties may be performed by a judge of the superior court designated by the Chief Justice of the Supreme Court.

(2) In actions in the district court, by the chief judge of the district, or if the chief judge is disabled, by any judge of the district court designated by the Director of the Administrative Office of the Courts.

If the substituted judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial. (1967, c. 954, s. 1.)

Comment. — Formerly, there was no statutory prescription in respect to the problem dealt with by this rule. It can be seen, however, that in particular cases where a verdict has already been returned or findings of fact and conclusions of law filed and then the trial judge is unable to continue to function, it will be highly useful to have some judge authorized to step into the breach.

Article 8.

Miscellaneous.

Rule 64. Seizure of person or property.

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of this State. (1967, c. 954, s. 1.)

Comment.—This rule seems to be self-explanatory.

Rule 65. Injunctions.

(a) *Preliminary injunction; notice.*—No preliminary injunction shall be issued without notice to the adverse party.

(b) *Temporary restraining order; notice; hearing; duration.*—A temporary restraining order may be granted without notice to the adverse party if it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the judge fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice and a motion for a preliminary injunction is made, it shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing, the party who obtained the temporary restraining order shall proceed with a motion for a preliminary injunction, and, if he does not do so, the judge shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the judge may prescribe, the adverse party may appear and move its dissolution or modification and in that event the judge shall proceed to hear and determine such motion as expeditiously as the ends of justice require. Damages may be awarded in an order for dissolution as provided in section (e).

(c) *Security.*—No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the State of North Carolina or of any county or municipality thereof, or any officer or agency thereof acting in an official capacity, but damages may be awarded against such party in accord with this rule. In suits between spouses relating to support, alimony, custody of children, separation, divorce from bed and board, and absolute divorce no such security shall be required of the plaintiff spouse as a condition precedent to the issuing of a temporary restraining order or preliminary injunction enjoining the defendant spouse from interfering with, threatening, or in any way molesting the plaintiff spouse during pendency of the suit, until further order of the court, but damages may be awarded against such party in accord with this rule.

A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the persons giving the security and the sureties thereon if their addresses are known.

(d) *Form and scope of injunction or restraining order.*—Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice in any manner of the order by personal service or otherwise.

(e) *Damages on dissolution.*—An order or judgment dissolving an injunction or restraining order may include an award of damages against the party procuring the injunction and the sureties on his undertaking without a showing of malice or want of probable cause in procuring the injunction. The damages may be determined by the judge, or he may direct that they be determined by a referee or jury. (1967, c. 954, s. 1.)

Comment.—

Practice Prior to Rule

While a plaintiff may be entitled to legal and equitable relief in a civil action, the preliminary injunction continues to be an extraordinary and provisional remedy and will not be granted except where adequate relief cannot be had without it. Town of Clinton v. Ross, 226 N.C. 682, 40 S.E.2d 593 (1946).

When temporary injunction issued. — The form of relief may be a preliminary injunction or restraining order, which may be issued:

(1) To preserve the status quo pending the action. As a rule, a mandatory order or injunction will not be made as a preliminary injunction except when the injury is immediate, pressing, irreparable, and clearly established. Seaboard Air Line Ry. v. Atlantic Coast Line Ry., 237 N.C. 88, 74 S.E.2d 430 (1953).

(2) To protect the subject matter of the action.

(3) To prevent fraudulent transfer. See § 1-485.

Time of issuing. — The preliminary injunction may be granted at the time of commencing the action or at any time afterwards, before judgment. Requisites are (a) affidavits; (b) summons.

When notice required. — When the restraining order is asked for as a preliminary motion, notice is not required, but if the judge deems it proper that the other party should be heard, he may issue a show cause order, and the defendant may, in the meantime, be restrained. A restraining order cannot be granted by a judge for a longer time than twenty days, without notice. After the defendant has answered, an injunction will not be granted except upon notice. However, the defendant may be restrained pending such action. See former §§ 1-490, 1-491, 1-492.

Undertaking.—Upon granting a restraining order or an order for an injunction, the judge shall require a written undertaking. See former § 1-496.

Appeals.—Upon appeal from a judgment vacating a restraining order or denying a perpetual injunction where the injunction is the principal relief sought, the court, in its discretion, may require plaintiff to give bond and continue the restraining order pending the appeal. See § 1-500.

Damages in injunction. — A judgment dissolving an injunction carries with it judgment for damages against the party procuring it and against his sureties without the requirement of malice or want of probable cause, which damages may be obtained by a reference or otherwise, as the judge directs. See former § 1-497.

Practice Under Rule

This rule is substantially the same as federal Rule 65.

Section (a).—This section provides that no preliminary injunction shall be issued without notice to the adverse party. While the rule does not specify the type of notice, proper service of the complaint and summons upon the party or his proper agent have been held sufficient. The court must have in personam jurisdiction. Section (b) specifies the time for hearing. On the hearing, the pleadings, if verified, and other affidavits have been held sufficient to grant a preliminary injunction.

The principal change here is the requirement of notice. Ordinarily, the purpose of the preliminary or interlocutory injunction is to preserve the status quo until the issues are determined after final hearing. Section (b) takes care of the situation where immediate action is necessary.

Section (b). — A restraining order is a temporary order, entered in an action, without notice, if necessary, and upon a summary showing of its necessity in order to prevent immediate and irreparable injury, pending a fuller hearing and determination of the rights of the parties. The ex parte restraining order is, under this section, then, subject to definite time limitations and is to preserve the status quo until the motion for a preliminary injunction can, after notice, be brought on for hearing and decision. Such ex parte order must be upon verified facts. Note, also, that such order granted without notice expires by its terms within such time after entry, not to exceed ten days, unless the time is, for good cause shown, extended.

Section (c).—The requirements with respect to security as set forth in this section are similar to the requirements of former § 1-496.

In general, there are two methods for enforcement of liability on a bond or other security given to secure the issuance of a restraining order or preliminary injunction: An independent action or motion for judgment in the injunction action. The second paragraph of section (c) deals with this second method of enforcement. Since this motion procedure is part of the "equity suit," there is no right to trial by jury on the issues raised. If, however, an independent action is brought, this would be one of law, and a right to jury would be preserved.

Section (d).—The requirement that the judge state the reasons for granting the injunction and the acts to be restrained is new. Under prior law no particular form of order was required, although the decisions hold that "the defendant shall be given authentic notification of the mandate of the court or judge." Davis v. Champion Fiber Co., 150 N.C. 84, 63 S.E. 178 (1908). There does not appear to be a statute as explicit as the final clause of section (d) with respect to the parties affected by the action.

Section (e).—This is substantially the same provision as is found in former § 1-497.

Editor's Note.—For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

Absent an express decision that plaintiff was not entitled to the temporary restraining order, the question is whether the order rendered was the equivalent of such a decision. M. Blatt Co. v. Southwell, 259 N.C. 468, 130 S.E.2d 859 (1963), decided under former § 1-497.

Voluntary and Unconditional Dismissal by Plaintiff. — In an action in which the plaintiff has obtained a temporary restraining order or injunction by giving bond as required by former § 1-496, the voluntary and unconditional dismissal of the proceedings by the plaintiff is equivalent to a judicial determination that the proceeding for an injunction was wrongful, since thereby the plaintiff is held to have confessed that he was not entitled to the equitable relief sought. M. Blatt Co. v. Southwell, 259 N.C. 468, 130 S.E.2d 859 (1963), decided under former § 1-497.

Proof.—To sustain an action for damages, it must be made to appear that such injunction was wrongful in its inception, or at least was continued owing to some wrong on the part of plaintiff. M. Blatt Co. v. Southwell, 259 N.C. 468, 130 S.E.2d 859 (1963), decided under former § 1-497.

Burden.—The burden of proof was on defendant to show as a prerequisite to his right to recover damages from plaintiff and its surety either that the court had finally decided plaintiff was not entitled to the temporary restraining order or that something had occurred equivalent to such a decision. M. Blatt Co. v. Southwell, 259 N.C. 468, 130 S.E.2d 859 (1963), decided under former § 1-497.

Effect of Injunction Rightfully Awarded but Properly Dissolved.—If an injunction is rightfully awarded, but afterwards properly dissolved because of matters done or arising subsequent to its issuance, there can be no recovery of damages. M. Blatt Co. v. Southwell, 259 N.C. 468, 130 S.E.2d 859 (1963), decided under former § 1-497.

Hence, a judgment of voluntary dismissal by agreement of the parties of an action in which a restraining order has been issued is not an adjudication that the restraining order was improvidently or erroneously issued. M. Blatt Co. v. Southwell, 259 N.C. 468, 130 S.E.2d 859 (1963), decided under former § 1-497.

Rule 66.

Omitted.

Rule 67.

Omitted.

Rule 68. Offer of judgment and disclaimer.

(a) *Offer of judgment.*—At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted within 10 days after its service shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) *Conditional offer of judgment for damages.*—A party defending against a claim arising in contract or quasi contract may, with his responsive pleading, serve upon the claimant an offer in writing that if he fails in his defense, the damages shall be assessed at a specified sum; and if the claimant signifies his acceptance thereof in writing within 20 days of the service of such offer, and on the trial prevails, his damages shall be assessed accordingly. If the claimant does not accept the offer, he must prove his damages as if the offer had not been made. If the damages assessed in the claimant's favor do not exceed the sum stated in the offer, the party defending shall recover the costs in respect to the question of damages. (1967, c. 954, s. 1.)

Comment.—Both sections of the rule would seem to be self-explanatory. They encompass the substance of former §§ 1-541 and 1-542. Former § 1-543, permitting a disclaimer of title by the defendant in trespass actions together with an offer to make amends, was repealed on the theory that its purpose can be accomplished by use of section (a).

Tender of judgment which is not made until after nonsuit has been entered and plaintiff has appealed therefrom and the session of court has expired, did not comply with former § 1-541. Oldham & Worth v. Bratton, 263 N.C. 307, 139 S.E.2d 653 (1965), decided under former § 1-541.

Rule 68.1. Confession of judgment.

(a) *For present or future liability.*—A judgment by confession may be entered without action at any time in accordance with the procedure prescribed by this rule. Such judgment may be for money due or for money that may become due. Such judgment may also be entered for alimony or for support of minor children.

(b) *Procedure.*—A prospective defendant desiring to confess judgment shall file with the clerk of the superior court as provided in section (c) a statement in writing signed and verified by such defendant authorizing the entry of judgment for the amount stated. The statement shall contain the name of the prospective plaintiff, his county of residence, the name of the defendant, his county of residence, and shall concisely show why the defendant is or may become liable to the plaintiff.

If either the plaintiff or defendant is not a natural person, for the purposes of this rule its county of residence shall be considered to be the county in which it has its principal place of business, whether in this State or not.

(c) *Where entered.*—Judgment by confession may be entered only in the county where the defendant resides or has real property or in the county where the plaintiff resides but the entry of judgment in any county shall be conclusive evidence that this section has been complied with.

(d) *Form of entry.*—When a statement in conformity with this rule is filed with the clerk of the superior court, the clerk shall enter judgment thereon for the amount confessed, and docket the judgment as in other cases, with costs, together with disbursements. The statement, with the judgment, shall become the judgment roll.

(e) *Force and effect.*—Judgments entered in conformity with this rule shall have the same effect as other judgments except that no judgment by confession shall be held to be res judicata as to any fact in any civil action except in an action on the judgment confessed. When such judgment is for alimony or support of minor children, the failure of the defendant to make any payments as required by such judgment shall subject him to such penalties as may be adjudged by the court as in any other case of contempt of its orders. Executions may be issued and enforced in the same manner as upon other judgments. When the full amount of the judgment is not all due, or is payable in installments, and the installments are not all due, execution may issue upon such judgment for the collection of such sums as have become due and shall be in usual form. Notwithstanding the issue and satisfaction of such execution, the judgment remains as security for the sums thereafter to become due; and whenever any further sum becomes due, execution may in like manner be issued. (1967, c. 954, s. 1.)

Comment.—While this rule largely follows former §§ 1-247, 1-248 and 1-249, there are some changes.

That part of former § 1-247 expressly allowing judgment to be confessed "to secure any person against contingent liability on behalf of the defendant" has been omitted. Otherwise, there has been no change in respect to the subject matter for which judgment may be confessed.

The provisions in respect to the particular county in which judgment may be confessed have been changed. Formerly, § 1-249 permitted a judgment to be confessed where the defendant resided or "has property." Since it would seem to be a simple matter for a defendant to have property in any county (simply by wearing his clothes there), the possibility of abuse of the procedure by nonresidents for the benefit of nonresidents is present. The rule therefore specifies that the property must be real property. More importantly, it provides that judgment may be confessed also in the county of the plaintiff's residence. It will be observed that section (c), after stating the appropriate counties for the confession of judgment, provides that entry of judgment is conclusive evidence that the section has been complied with. This, in effect, puts the responsibility on the clerks for the enforcement of this section. At any rate, it prevents any nice inquiry as to whether it has been complied with.

Editor's Note.—For note as to consent judgments for alimony, see 35 N.C.L. Rev. 405 (1957).

Distinction between Attack on Judgment by Creditors of Debtor and by Debtor Himself.—There is a distinction between challenges to the validity of a confessed judgment made by creditors of the confessing debtor, and by the debtor himself. Pulley v. Pulley, 255 N.C. 423, 121 S.E.2d 876 (1961), decided under former § 1-247.

Defendant was estopped to question the validity of his own confessed judgment for alimony. See Pulley v. Pulley, 255 N.C. 423, 121 S.E.2d 876 (1961), decided under former § 1-247.

Rule 69.

Omitted.

Rule 70. Judgment for specific acts; vesting title.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the judge may direct the act to be done at the cost of the disobedient party by some other person appointed by the judge and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The judge may also in proper cases adjudge the party in contempt. If real or personal property is within the State, the judge in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to execution upon application to the clerk upon payment of the necessary fees. (1967, c. 954, s. 1.)

Comment.—While preserving the essence of the former vesting statute, § 1-227, the rule as drafted makes two changes. First, where a party has been directed in a judgment to perform an act and has failed to so perform, it imports into the statutes for the first time authorization for the court to have someone else to perform the act with "like effect as if done by the party." Perhaps this authorization is most obviously applicable to specific performance decrees, yet it should be noted that it is not limited to transfers of title but extends to all acts which the court might properly direct in a judgment. Second, the rule makes it clear that a judgment divesting title and vesting it in others "has the effect of a conveyance" without further words being added to the effect that the judgment "shall be regarded as a deed of conveyance." See Morris v. White, 96 N.C. 91, 2 S.E. 254 (1887), and Evans v. Brendle, 173 N.C. 149, 91 S.E. 723 (1917).

Rule 71 to Rule 83.

Omitted.

Rule 84. Forms.

The following forms are sufficient under these rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate:

(1) Complaint on a Promissory Note.

1. On or about ...., 19.., defendant executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on ...., 19...., the sum of .... dollars with interest thereon at the rate of .... percent per annum].

2. Defendant owes to plaintiff the amount of said note and interest.

Wherefore, plaintiff demands judgment against defendant for the sum of .... dollars, interest and costs.

(2) Complaint on Account.

Defendant owes plaintiff .... dollars according to the account hereto annexed as Exhibit A.

Wherefore, plaintiff demands judgment against defendant for the sum of .... dollars, interest and costs.

(3) Complaint for Negligence.

1. On ...., 19.., at [name of place where accident occurred], defendant negligently drove a motor vehicle against plaintiff who was then crossing said street.

2. Defendant was negligent in that:

(a) Defendant drove at an excessive speed.
(b) Defendant drove through a red light.
(c) Defendant failed to yield the right-of-way to plaintiff in a marked crosswalk.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization [in the sum of one thousand dollars] (or) [in an amount not yet determined].

Wherefore, plaintiff demands judgment against defendant in the sum of .... dollars and costs.

(4) Complaint for Negligence.

(Where Plaintiff Is Unable to Determine Definitely Whether One or the Other of Two Persons Is Responsible or Whether Both Are Responsible and Where His Evidence May Justify a Finding of Wilfulness or of Recklessness or of Negligence.)

1. On ...., 19.., at ...., defendant X or defendant Y, or both defendants X and Y, wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said street.

2. Defendant X or defendant Y, or both defendants X and Y were negligent in that:

(a) Either defendant or both defendants drove at an excessive speed.

(b) Either defendant or both defendants drove through a red light.

(c) Either defendant or both defendants failed to yield the right-of-way to plaintiff in a marked crosswalk.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization [in the sum of one thousand dollars] (or) [in an amount not yet determined].

Wherefore, plaintiff demands judgment against X or against Y or against both in the sum of .... dollars and costs.

(5) Complaint for Specific Performance.

1. On or about ...., 19.., plaintiff and defendant entered into an agreement in writing, a copy of which is hereto annexed as Exhibit A.

2. In accord with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

3. Plaintiff now offers to pay the purchase price.

Wherefore, plaintiff demands (1) that defendant be required specifically to perform said agreement, (2) damages in the sum of .... dollars, and (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of .... dollars.

(6) Complaint in the Alternative.

I.

Defendant owes plaintiff .... dollars according to the account hereto annexed as Exhibit A.

II. ALTERNATIVE COUNT

Plaintiff claims in the alternative that defendant owes plaintiff .... dollars for goods sold and delivered by plaintiff to defendant between .... , 19.., and ...., 19...

(7) Complaint for Fraud.

1. On ...., 19.., at ...., defendant with intent to defraud plaintiff represented to plaintiff that ....

2. Said representations were known by defendant to be and were false. In truth, [what the facts actually were].

3. Plaintiff believed and relied upon the false representations, and thus was induced to ....

4. As a result of the foregoing, plaintiff has been damaged [nature and amount of damage].

Wherefore, plaintiff demands judgment against defendant for .... dollars, interest and costs.

(8) Complaint for Money Paid by Mistake.

Defendant owes plaintiff .... dollars for money paid by plaintiff to defendant by mistake under the following circumstances:

1. On ...., 19.., at ...., pursuant to a contract ...., plaintiff paid defendant .... dollars.

(9) Motion for Judgment on the Pleadings.

Plaintiff moves that judgment be entered for plaintiff on the pleadings, on the ground that the undisputed facts appearing therein entitle plaintiff to such judgment as a matter of law.

(10) Motion for More Definite Statement.

Defendant moves for an order directing plaintiff to file a more definite statement of the following matters: [set out]

The ground of this motion is that plaintiff's complaint is so [vague] [ambiguous] in respect to these matters that defendant cannot reasonably be required to frame an answer hereto, in that the complaint ....

(11) Answer to Complaint.

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

If defendant is indebted to plaintiff as alleged in the complaint, he is indebted to plaintiff jointly with X. X is alive; is a resident of the State of North Carolina, and is subject to the jurisdiction of this court as to service of process; and has not been made a party.

Third Defense

1. Defendant admits the allegations contained in paragraphs .... and .... of the complaint.
2. Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph .... of the complaint.
3. Defendant denies each and every other allegation contained in the complaint.

Fourth Defense

The right of action set forth in the complaint did not accrue within .... year next before the commencement of this action.

Counterclaim

[Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint.]

Crossclaim Against Defendant Y

[Here set forth the claim constituting a crossclaim against defendant Y in the manner in which a claim is pleaded in a complaint.]

Dated: ....

....

Attorney for Defendant

(12) Motion to Bring in Third-Party Defendant.

Defendant moves for leave to make X a party to this action and that there be served upon him summons and third-party complaint as set forth in Exhibit A attached.

(13) Third-Party Complaint.

....
Plaintiff,
v.

.................................., *Third-Party Complaint*
Defendant and
Third-Party Plaintiff,
v.

....
Third-Party Defendant.

Civil Action No. ....

1. Plaintiff .... has filed against defendant .... a complaint, a copy of which is attached as "Exhibit C."

2. [Here state the grounds upon which the defendant and third-party plaintiff

is entitled to recover from the third-party defendant all or part of what plaintiff may recover from the defendant and third-party plaintiff.]

Wherefore, plaintiff demands judgment against third-party defendant .... for all sums that may be adjudged against defendant .... in favor of plaintiff.

(14) Complaint for Negligence Under Federal Employer's Liability Act.

1. During all the times herein mentioned defendant owned and operated in interstate commerce a railroad which passed through a tunnel located at .... and known as Tunnel No. ....

2. On or about June 1, 19.., defendant was repairing and enlarging the tunnel in order to protect interstate trains and passengers and freight from injury and in order to make the tunnel more conveniently usable for interstate commerce.

3. In the course of thus repairing and enlarging the tunnel on said day defendant employed plaintiff as one of its workmen, and negligently put plaintiff to work in a portion of the tunnel which defendant had left unprotected and unsupported.

4. By reason of defendant's negligence in thus putting plaintiff to work in that portion of the tunnel, plaintiff was, while so working pursuant to defendant's orders, struck and crushed by a rock which fell from the unsupported portion of the tunnel, and was (here describe plaintiff's injuries).

5. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning .... dollars per day. By these injuries he has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount of .... dollars for medicine, medical attendance, and hospitalization.

Wherefore, plaintiff demands judgment against defendant in the sum of .... dollars and costs.

(15) Complaint for Interpleader and Declaratory Relief.

1. On or about June 1, 19.., plaintiff issued to G. H. a policy of life insurance whereby plaintiff promised to pay to K. L. as beneficiary the sum of .... dollars upon the death of G. H. The policy required the payment by G. H. of a stipulated premium on June 1, 19.., and annually thereafter as a condition precedent to its continuance in force.

2. No part of the premium due June 1, 19.., was ever paid and the policy ceased to have any force or effect on July 1, 19...

3. Thereafter, on September 1, 19.., G. H. and K. L. died as the result of a collision between a locomotive and the automobile in which G. H. and K. L. were riding.

4. Defendant C. D. is the duly appointed and acting executor of the will of G. H.; defendant E. F. is the duly appointed and acting executor of the will of K. L.; defendant X. Y. claims to have been duly designed as beneficiary of said policy in place of K. L.

5. Each of defendants, C. D., E. F., and X. Y. is claiming that the above-mentioned policy was in full force and effect at the time of the death of G. H.; each of them is claiming to be the only person entitled to receive payment of the amount of the policy and has made demand for payment thereof.

6. By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy, if it was in force at the death of G. H.

Wherefore plaintiff demands that the court adjudge:

(1) That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

(2) That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

(3) That, if the court shall determine that said policy was in force at the

death of G. H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy, and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

(4) That plaintiff recover its costs.

(16) Averment of Capacity Under Rule 9 (a).

(North Carolina Corporation)

Plaintiff is a corporation incorporated under the law of North Carolina having its principal office in [address].

(Foreign Corporation)

Plaintiff is a corporation incorporated under the law of the State of Deleware having [not having] a registered office in the State of North Carolina.

(Unincorporated Association)

Plaintiff is an unincorporated association organized under the law of the State of New York having its principal office in [address] and (if applicable) having a principal office in the State of North Carolina at [address], and as such has the capacity to sue in its own name in North Carolina. (1967, c. 954, s. 1.)

Chapter 1B.

Contribution.

Article 1.

Uniform Contribution among Tort-Feasors Act.

Sec.

1B-1. Right to contribution.
1B-2. Pro rata shares.
1B-3. Enforcement.
1B-4. Release or covenant not to sue.
1B-5. Uniformity of interpretation.
1B-6. Short title.

Article 2.

Judgment against Joint Obligors or Joint Tort-Feasors.

Sec.

1B-7. Payment of judgment by one of several.

Article 3.

Cross Claims and Joinder of Third Parties for Contribution.

1B-8. [Repealed.]

ARTICLE 1.

Uniform Contribution among Tort-Feasors Act.

§ **1B-1. Right to contribution.**—(a) Except as otherwise provided in this article, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tort-feasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death.

(d) A tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor whose liability for the injury or wrongful death has not been extinguished nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(e) A liability insurer, who by payment has discharged in full or in part the liability of a tort-feasor and has thereby discharged in full its obligation as insurer, succeeds to the tort-feasor's right of contribution to the extent of the amount it has paid in excess of the tort-feasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

(f) This article does not impair any right of indemnity under existing law. Where one tort-feasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

(g) This article shall not apply to breaches of trust or of other fiduciary obligation. (1967, c. 847, s. 1.)

Editor's Note.—Section 4, c. 847, Session Laws 1967, provides that the act shall be in full force and effect from and after Jan. 1, 1968. Section 3½, c. 847, Session Laws 1967, provides that the act shall not apply to litigation pending on its effective date.

The cases cited in this note were decided under former § 1-240.

For article on permissive joinder of parties and causes, see 34 N.C.L. Rev. 405 (1956). For note on effect of covenant not to sue, see 35 N.C.L. Rev. 141 (1956). For note on cross claim for contribution, see 40 N.C.L. Rev. 633 (1962). For comment on rights of contribution, see 41 N.C.L. Rev. 882 (1963). For comment on contribution among joint tort-feasors and rights of insurers, see 44 N.C.L. Rev. 142 (1965). For case law survey as to contribution, indemnity and settlement, see 44 N.C.L. Rev. 1051 (1966). For comment on this chapter, see 47 N.C.L. Rev. 274 (1968); 5 Wake Forest Intra. L. Rev. 160 (1969).

Common Law.—At common law, as between joint tort-feasors, there was no right of contribution. Shaw v. Baxley, 270 N.C. 740, 155 S.E.2d 256 (1967).

At common law no right of action for contribution existed between or among joint tort-feasors who were in pari delicto, thus the right is statutory, and its use necessarily depends upon the terms of the statute. Godfrey v. Tidewater Power Co., 223 N.C. 647, 27 S.E.2d 736 (1943); Hayes v. City of Wilmington, 239 N.C. 238, 79 S.E.2d 792 (1954); Bell v. Lacey, 248 N.C. 703, 104 S.E.2d 833 (1958); Greene v. Charlotte Chem. Labs., 254 N.C. 680, 120 S.E.2d 82 (1961).

Under the rules of the common law the right of one joint tort-feasor to compel contribution from another did not exist. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

Legislative Intent.—It is safe to assume that the General Assembly was moved to enact this legislation by the reason underlying the entire law of contribution, namely, that where one person has been compelled to pay money which others were equally bound to pay, each of the latter in good conscience should contribute the proportion which he ought to pay of the amount expended to discharge the common burden or obligation. Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953).

This statute creates a new right, provides an exclusive remedy, and substantial compliance with its terms is necessary to make it available. Hoft v. Mohn, 215 N.C. 397, 2 S.E.2d 23 (1939); Potter v. Frosty Morn Meats, Inc., 242 N.C. 67, 86 S.E.2d 780 (1955).

The common-law rule that there is no right of contribution between joint tort-feasors has been modified in this State so as to provide for enforcement of contribution as between joint tort-feasors in the manner and to the extent provided by statute. Herring v. Jackson, 255 N.C. 537, 122 S.E.2d 366 (1961).

The enactment of this statute created as to parties jointly and severally liable a new right and ready means for the enforcement of that right. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957).

Prior to the enactment of this section one tort-feasor was, as a rule, not entitled to contribution from another. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

In this jurisdiction, the common-law rule has been modified by statute so as to provide for enforcement of contribution as between joint tort-feasors in accordance with its provisions. Shaw v. Baxley, 270 N.C. 740, 155 S.E.2d 256 (1967).

Purpose.—The purpose of this statute permitting the joinder of a third party against whom the defendant seeks contributions as joint tort-feasor, was to enable litigants in tort actions to determine in one action all matters in controversy growing out of the same subject of action. Read v. Young Roofing Co., 234 N.C. 273, 66 S.E.2d 821 (1951).

Right Must Be Enforced According to Form of Statute.—The right to contribution comes from this statute, and it is to be enforced according to the form of the statute. Tarkington v. Rock Hill Printing & Finishing Co., 230 N.C. 354, 53 S.E.2d 269 (1949); Potter v. Frosty Morn Meats, Inc., 242 N.C. 67, 86 S.E.2d 780 (1955).

Contribution is made the rule and not the exception by this statute. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

This statute seems to abrogate the well-settled rule, that, subject to some exceptions (Gregg v. City of Wilmington, 155 N.C. 18, 70 S.E. 1070 (1911)), there can be no contribution between joint tort-feasors. Lineberger v. Gastonia, 196 N.C. 445, 146 S.E. 79 (1929), citing Raulf v. Elizabeth City Light & Power Co., 176 N.C. 691, 97 S.E. 236 (1918); Hayes v. City of Wilmington, 239 N.C. 238, 79 S.E.2d 792 (1954).

Joint tort-feasors and joint judgment debtors are given the right to contribution. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

The right of contribution is a personal right. Pittman v. Snedeker, 264 N.C. 55, 140 S.E.2d 740 (1965).

And Cannot Be Assigned or Transferred.—The right of contribution is not one that can be assigned or transferred by operation of law under the doctrine of subrogation. Pittman v. Snedeker, 264 N.C. 55, 140 S.E.2d 740 (1965).

Right to Contribution Is Not Dependent on Plaintiff's Continued Right to Sue.—The right of one joint tort-feasor to enforce contribution against another is said to spring from the plaintiff's suit. This right of contribution, however, projects itself beyond the plaintiff's suit, and is not dependent upon the plaintiff's continued right to sue both or all the joint tort-feasors. Godfrey v. Tidewater Power Co., 223 N.C. 647, 27 S.E.2d 736, 149 A.L.R. 1183 (1943). It is the joint tort and common liability to suit which gives rise to the right to enforce contribution under this statute. Tarkington v. Rock Hill Printing & Finishing Co., 230 N.C. 354, 53 S.E.2d 269 (1949); White v. Keller, 242 N.C. 97, 86 S.E.2d 795 (1955).

There can be no contribution unless the parties are joint tort-feasors. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

Liability for contribution under this statute cannot be invoked except among joint tort-feasors. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953); Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

An original defendant may not invoke the statutory right of contribution against another party in a tort action unless both parties are liable as joint tort-feasors to the plaintiff in the action. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965).

Where insureds are adjudged to be joint tort-feasors and judgments are rendered against them, they are within the specific provisions of this statute. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

A defendant who has been sued for tort may bring into the action for the purpose of enforcing contribution under this statute only a joint tort-feasor whom plaintiff could have sued originally in the same action. Petrea v. Ryder Tank Lines, 264 N.C. 230, 141 S.E.2d 278 (1965).

In an action for wrongful death instituted by the administrator of a deceased unemancipated child against the driver of the car inflicting the fatal injury, defendant is not entitled to have the child's mother joined as a party defendant for the purpose of contribution or indemnity upon allegations that the child's mother was negligent in permitting the child to enter upon the highway unattended, since the mother cannot be liable to the plaintiff as a joint tort-feasor, and the statutory right of contribution and the right to indemnity on the ground of primary and secondary liability are both based upon the liability of a joint tort-feasor. Lewis v. Farm Bureau Mut. Auto. Ins. Co., 243 N.C. 55, 89 S.E.2d 788 (1955).

Since an unemancipated infant who is a member of the household cannot maintain an action for negligence against his parents, in an action on behalf of an unemancipated child to recover for negligent injury, the defendants may not file a cross action against the plaintiff's parents for contribution under this section because such cross action would indirectly hold the unemancipated minor's parents liable to him for the injury. Watson v. Nichols, 270 N.C. 733, 155 S.E.2d 154 (1967).

Permission of Original Plaintiff Not Required.—When one joint tort-feasor is sued alone he may join other joint tort-feasors for contribution under this statute without permission from the original plaintiff. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957); McBryde v. Coggins-McIntosh Lumber Co., 246 N.C. 415, 98 S.E.2d 663 (1957).

Plaintiff Cannot Be Compelled to Sue Joint Tort-Feasors. — Insofar as plaintiff is concerned, when he has elected to sue only one of joint tort-feasors, the others are not necessary parties and plaintiff cannot be compelled to pursue them; nor can the original defendant avail himself of this statute to compel plaintiff to join issue with a defendant he has elected not to sue. Original defendant cannot rely on the liability of the party brought in to the original plaintiff, but most recover, if at all, upon the liability of such party to him. Charnock v. Taylor, 223 N.C. 360, 26 S.E.2d 911, 148 A.L.R. 1126 (1943); Hayes v. City of Wilmington, 239 N.C. 238, 79 S.E.2d 792 (1954); Bell v. Lacey, 248 N.C. 703, 104 S.E.2d 833 (1958); Greene v. Charlotte Chem. Labs., 254 N.C. 680, 120 S.E.2d 82 (1961).

A defendant sued in tort cannot compel plaintiff to sue all responsible for the damage, but the party sued may have contribution from all responsible for the damage. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

This statute made no attempt to interfere with the right of the injured party to decide who would be called on for compensation. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

When a person has been injured through the concurring negligence of two or more persons, he may sue one or all the joint tort-feasors at his option. Insofar as he is concerned, the others are not necessary parties and he may not be compelled to bring them in. They may, however, be brought in by the original defendant on a cross complaint in which he alleges joint tort-feasorship and his right to contribution in the event plaintiff recovers judgment against him. Hayes v. City of Wilmington, 239 N.C. 238, 79 S.E.2d 792 (1954).

Election to Sue Less Than All Tort-Feasors.—When the aggrieved party elects to sue only one, or less than all the tort-feasors, the original defendant or defendants may have the others made additional defendants under this statute for the purpose of enforcing contribution in the event the plaintiff recovers. Phillips v. Hassett Mining Co., 244 N.C. 17, 92 S.E.2d 429 (1956).

Right to Bring in Persons Not Necessary Parties.—A party is given the right to bring in others not necessary parties, i.e., the right to bring in joint obligors for contribution. Overton v. Tarkington, 249 N.C. 340, 106 S.E.2d 717 (1959).

The party brought in may assert any defense appropriate to the cause of action asserted against him. He may plead estoppel by settlement or a judgment binding the parties. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957).

Additional Party under No Obligation to Answer Allegations in Original Complaint.—An additional party defendant has no cause of action stated against him except that asserted in the cross action and set out in the cross complaint. Hence, the additional party defendant is under no obligation to answer any allegations in the original complaint, but only those alleged against him in the cross complaint. Greene v. Charlotte Chem. Labs., 254 N.C. 680, 120 S.E.2d 82 (1961).

When Too Late to Bring in Other Joint Tort-Feasors. — When joint tort-feasors, who have been sued in an action, fail to file an answer to a complaint that states a good cause of action, and the plaintiffs obtain a judgment by default and inquiry, which is regular in all respects, a motion, lodged thereafter, to bring in other joint tort-feasors so as to determine liability for contribution as between themselves, comes too late. Denny v. Coleman, 245 N.C. 90, 95 S.E.2d 352 (1956).

Allegations in Cross Action for Contribution.—In order to maintain a cross action against another for contribution under this statute, the original defendant must allege facts sufficient to show that both of them are liable to the plaintiff as joint tort-feasors. Potter v. Frosty Morn Meats, Inc., 242 N.C. 67, 86 S.E.2d 780 (1955).

When a defendant in a negligent injury action files answer denying negligence but alleging, conditionally or in the alternative, that if he were negligent, a third party also was negligent and that the negligence of such third party concurred in causing the injury in suit, the defendant is entitled, on demand for relief by way of contribution, to have such third person joined as a codefendant under this statute. Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (1956).

When a defendant in a negligent injury action files answer denying negligence but alleging that if it were negligent a third party was also guilty of negligence which concurred in causing the injury in suit, and demands affirmative relief against such third person, he is entitled to have such third person joined as a codefendant under this statute. Freeman v. Thompson, 216 N.C. 484, 5 S.E.2d 434 (1939); Lackey v. Southern Ry., 219 N.C. 195, 13 S.E.2d 234 (1941). See also Bost v. Metcalfe, 219 N.C. 607, 14 S.E.2d 648 (1941); Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (1956); Denny v. Coleman, 245 N.C. 90, 95 S.E.2d 352 (1956); Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

In order for one defendant to join another as additional defendant for the purpose of contribution he must show by his allegations facts sufficient to make them both liable to the plaintiff as joint tort-feasors, and allegations showing only a cause of action which would entitle the plaintiff to recover of such additional party are not sufficient. Hayes v. City of Wilmington, 239 N.C. 238, 79 S.E.2d 792 (1954); Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (1956).

In order for one defendant to join another as a third-party defendant for the purpose of contribution, he must allege facts sufficient to show joint tort-feasorship and his right to contribution in the event plaintiff recovers against him. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965); Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

In order to show joint tort-feasorship, it is necessary that the facts alleged in the cross complaint be sufficient to make the third party liable to the plaintiff along with the cross-complaining defendant in the event of a recovery by the plaintiff against him. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965); Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

The allegations of the cross complaint must be so related to the subject matter declared on in the plaintiff's complaint as to disclose that the plaintiff, had he desired to do so, could have joined the third party as a defendant in the action. Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

To entitle the original defendant in a tort action to have some third party made an additional party defendant to enforce contribution, it must be made to appear from the facts alleged in the cross action that the defendant and such third person are tort-feasors in respect to the subject of controversy, jointly liable to the plaintiff for the particular wrong alleged in the complaint. The facts must be such that the plaintiff, had he desired so to do, could have joined such third party as defendant in the action. Hobbs v. Goodman, 240 N.C. 192, 81 S.E.2d 413 (1954). See Hobbs v. Goodman, 241 N.C. 297, 84 S.E.2d 904 (1954); Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (1956); Johnson v. Catlett, 246 N.C. 341, 98 S.E.2d 458 (1957); Jones v. Douglas Aircraft Co., 253 N.C. 482, 117 S.E.2d 496 (1960).

Where cross complaint was insufficient to allege facts tending to show that the negligence of the other defendants concurred in proximately causing the injury in suit, the demurrer of such defendants was properly sustained. Potter v. Frosty Morn Meats, Inc., 242 N.C. 67, 86 S.E.2d 780 (1955).

For allegations sufficient to state cause of action against joint tort-feasor for contribution, see Read v. Young Roofing Co., 234 N.C. 273, 66 S.E.2d 821 (1951).

Burden Is on Original Defendant to Prove Cross Action.—Where plaintiff does not demand any relief against a codefendant joined by the original defendant as a joint tort-feasor, the burden is on the original defendant to prove his cross action for contribution, and upon motion of the codefendant for nonsuit on the cross action the evidence must be considered in the light most favorable to the original defendant upon that cause. Pascal v. Burke Transit Co., 229 N.C. 435, 50 S.E.2d 534 (1948); Stansel v. McIntyre, 237 N.C. 148, 74 S.E.2d 345 (1953).

Where one joint tort-feasor has others joined for contribution, he is, as to the new defendants, a plaintiff and must establish his right of action, and such additional defendants may assert any appropriate defense to the cross action without regard to relevancy to the claim of plaintiff. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957).

Procedure for Contribution between Defendants. — The procedure to be followed in this State, when the right of contribution between defendants is claimed, seems to be set forth in Whiteman v. Seashore Transp. Co., 231 N.C. 701, 58 S.E.2d 752 (1950). Byerly v. Shell, 312 F.2d 141 (4th Cir. 1962).

Original Defendant Becomes a Plaintiff as to Additional Defendant. — Where a plaintiff does not bring his action against all joint tort-feasors, and an original defendant sets up a cross action against a third party and has him brought in as an additional party defendant for contribution, such original defendant makes himself a plaintiff as to the additional party defendant. Bell v. Lacey, 248 N.C. 703, 104 S.E.2d 560 (1959); Cox v. E.I. DuPont Chem. Labs., 254 N.C. 680, 120 S.E.2d 82 (1961).

When an injured party elects to sue some but not all of the tort-feasors responsilbe for his injuries, those sued have a right to bring the other wrongdoers in for contribution. The original defendant then becomes as to the tort-feasors not sued a plaintiff. Etheridge v. Carolina Power & Light Co., 249 N.C. 367, 106 S.E.2d 560 (1959); Cox v. E. I. DuPont de Nemours & Co., 269 F. Supp. 176 (D.S.C. 1967).

Additional Defendant May File Counterclaim against Original Defendant. — Where the original defendant has another joined as additional defendant for contribution on the ground of their concurring negligence in producing plaintiff's injury, the additional defendant may file a counterclaim against the original defendant for damages to the additional defendant's property allegedly resulting from the negligence of the original defendant, and such counterclaim is improperly stricken upon motion of the original defendant. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957).

Defendant may not exculpate himself from liability for his negligence by showing that codefendant was also negligent. Byerly v. Shell, 312 F.2d 141 (4th Cir. 1962).

Judicial Admission of Negligence Need Not Be Made in Order to Interplead Third Party. — To interplead a third party for contribution the law does not require a defendant in a personal-injury suit to make a judicial admission that his negligence was one of the proximate causes of the injury for which plaintiff sues. He may deny negligence and allege, conditionally or alternatively, that if he was negligent, the third party's negilgence concurred with his as a proximate cause of plaintiff's injuries. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965).

Primary and secondary liability between defendants exists only when: (1) they are jointly and severally liable to the plaintiff; and (2) either (a) one has been passively negligent but is exposed to liability through the active negligence of the other or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former. Anderson v. Robinson, 275 N.C. 132, 165 S.E.2d 502 (1969).

A defendant secondarily liable, when sued alone, may have the person primarily liable brought in to respond to the original defendant's cross action. Hendricks v. Leslie Fay, Inc., 273 N.C. 59, 159 S.E.2d 362 (1968).

Cross Action for Indemnity. — Where two alleged tort-feasors are sued by the injured party, one may set up a cross action against the other for indemnity, under the doctrine of primary-secondary liability, and have the matter adjudicated in that action. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963); Hendricks v. Leslie Fay, Inc., 273 N.C. 59, 159 S.E.2d 362 (1968).

A tort-feasor whose liability is secondary, upon payment by him of the injured party's recovery, is entitled to indemnity against the primary wrongdoer. Ingram v. Nationwide Mut. Ins. Co., 258 N.C. 632, 129 S.E.2d 222 (1963).

Independently of this statute, the law permits an adjudication in one action of primary and secondary liability between joint tort-feasors who are not in pari delicto. A defendant secondarily liable, when sued alone, may have the tort-feasor primarily liable brought into the action by alleging a cross action for indemnification against him. Edwards v. Hamill, 262 N.C. 528, 138 S.E.2d 151 (1964).

Establishing Right to Indemnity from Second Defendant.—In order for one defendant to establish a right to indemnity from a second defendant, he must allege and prove (1) that the second defendant is liable to plaintiff, and (2) that the first defendant's liability to plaintiff is derivative, that is, based on tortious conduct of the second defendant, or that the first defendant is only passively negligent but is exposed to liability through the active negligence of the second defendant. Anderson v. Robinson, 275 N.C. 132, 165 S.E.2d 502 (1969).

Constructive Tort-Feasor May Recover Full Indemnity against Actual Wrongdoer.—Where two persons are jointly liable in respect to a tort, one being liable because he is the actual wrongdoer, and the other by reason of constructive or technical fault imposed by law, the latter, if blameless as between himself and his co-tort-feasor, ordinarily will be allowed to recover full indemnity over against the actual wrongdoer. Hendricks v. Leslie Fay, Inc., 273 N.C. 59, 159 S.E.2d 362 (1968).

Where liability has been imposed on the master because of the negligence of his servant, and the master did not participate in the wrong and incurs liability solely under the doctrine of respondeat superior, the master, having discharged the liability, may recover full indemnity from the servant. Hendricks v. Leslie Fay, Inc., 273 N.C. 59, 159 S.E.2d 362 (1968).

Allegation by plaintiff that defendants jointly and concurrently proximately caused her injuries is a conclusion of the pleader and is not admitted by demurrer. Anderson v. Robinson, 275 N.C. 132, 165 S.E.2d 502 (1969).

Section 1-166 Inapplicable to Cross Action against Unknown Joint Tort-Feasor.—The obvious purpose of § 1-166 is to provide a plaintiff a means to toll the statute of limitations when he does not yet know the proper designation of the defendant. No comparable necessity exists when a defendant desires to pursue a cross action for contribution against an unknown joint tort-feasor, since the statute does not begin to run on the claim for contribution until judgment has been recovered against the first tort-feasor. Wall Funeral Home v. Stafford, 3 N.C. App. 578, 165 S.E.2d 532 (1969).

Only Pro Rata Share Required.—This statute does not contemplate that one brought in as an additional defendant shall pay more than a pro rata part of any verdict rendered against the original defendants. Jordan v. Blackwelder, 250 N.C. 189, 108 S.E.2d 429 (1959).

Interjecting Action Not Germane.—The cross action for contribution between defendants charged with tort may not be used, however, to interject into the litigation another action not germane to the plaintiff's action. White v. Keller, 242 N.C. 97, 86 S.E.2d 795 (1955).

Enforcement of Contribution.—In substance this statute provides that where two or more persons are liable for their joint tort and judgment has been rendered against some, but not all, those who pay may enforce contribution against the others who are jointly liable. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

The right of the party sued to have contribution from all responsible for the damage may be enforced in either of two ways. The party sued may wait until a judgment has been obtained against him, whereupon he may maintain an action against the other tort-feasors; or defendant may, in the action against him, have the other tort-feasors made parties. In either event the party called on to compensate the injured party is a plaintiff in the action against his alleged joint tort-feasors. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

The plaintiff himself may, at his election, sue any one or all of the tort-feasors. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965).

Section Inapplicable to Insurers.—Since the liability of insurance carriers of tort-feasors is contractual and not founded on tort, where no judgment had been recovered against such a carrier by any of the parties to an action, it was held that this statute was inapplicable as by its express terms it applies only to joint tort-feasors and to joint judgment debtors. Gaffney v. Lumbermen's Mut. Cas. Co., 209 N.C. 515, 184 S.E. 46 (1936); Lumbermen's Mut. Cas. Co. v. United States Fid. & Guar. Co., 211 N.C. 13, 188 S.E. 634 (1936); Squires v. Sorahan, 252 N.C. 589, 114 S.E.2d 277 (1960).

An insurer paying the judgment obtained by the injured party against one tort-feasor has no right of action to enforce contribution against the other tort-feasor and cannot acquire such right of action by the device of a "loan" to the injured party payable only in the event and to the extent of any recovery which the injured party may obtain against the other tort-feasor and in an action for contribution in the name of the injured party, maintained solely in the interest of the insurer, the injured party is not a real party in interest. Herring v. Jackson, 255 N.C. 537, 122 S.E.2d 366 (1961).

The insurance carrier who pays a joint tort-feasor's obligations to the injured party cannot force contribution from other tort-feasors. The statute cannot be stretched to include subrogation, which arises by reason of contract, into contribution, which arises by reason of participation in the tort. Squires v. Sorahan, 252 N.C. 589, 114 S.E.2d 277 (1960).

Subrogation is not included within the framework of this statute. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

An automobile insurer of one joint tort-feasor after discharging in full a judgment obtained by an injured party against its insured cannot maintain in its own name an action for contribution under this statute against a second joint tort-feasor whose negligence proximately caused and contributed to the injury for which the judgment was obtained where the second tort-feasor was not made a party to the original suit. The plaintiff's rights as insurer arise by contract of subrogation under its policy and not as a result of its joint liability as a tort-feasor who has paid the judgment and is entitled to force contribution under this statute. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

The right permitted to be enforced under this statute is one of contribution and not one of subrogation. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

Payment of Judgment by Insurer Does Not Affect Original Defendant's Right to Contribution.—Where insurer of original defendant pays plaintiff's judgment against its insured and plaintiff's judgment is marked paid and satisfied, the original defendant's right to contribution from another defendant is not affected and the insurer is entitled to enforce his claim. Pittman v. Snedeker, 264 N.C. 55, 140 S.E.2d 740 (1965).

Neither Joint Tort-Feasor May Preclude Dismissal of Action against the Other.—Where plaintiff elects to sue both joint tort-feasors and alleges active negligence on the part of both which concurred in producing the injury, each is entitled to contribution from the other if there is a judgment of joint and several liability against them, but during the course of the trial each is a defendant as to the plaintiff only, and neither may preclude the dismissal of the action against the other if plaintiff fails to make out a prima facie case against the other, and allegations and prayer for contribution contained in the answer of one are properly stricken on motion to the other. Greene v. Charlotte Chem. Labs., 254 N.C. 680, 120 S.E.2d 82 (1961).

Unless Plaintiff Makes Out Prima Facie Case.—Where the plaintiff had made out a prima facie case against both defendants, the dismissal of other defendants was improper since this prevented the codefendants from pressing their claim for contribution. Byerly v. Shell, 312 F.2d 141 (4th Cir. 1962).

Assertion of Right against Another Tort-Feasor Not Barred by Failure to Perfect Appeal.—Where plaintiff has established one tort-feasor's duty to compensate her, that tort-feasor, by its failure to perfect its appeal from the adjudication of its liability to plaintiff and the discharge thereof, is not thereby barred from asserting its right against another tort-feasor. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

Effect of Settlement. — While the passengers, by making settlement with one joint tort-feasor, waived any right they might have possessed to seek compensation from the other, the tort-feasor making settlement with them waived no right it possessed to assert its claim to contribution against the other alleged joint tort-feasor in an action by a passenger with whom no settlement has been made. Snyder v. Kenan Oil Co., 235 N.C. 119, 68 S.E.2d 805 (1952).

Res Judicata. — Where the initial action is instituted by the passenger in one vehicle against the driver of the other vehicle, in which the passenger's driver is joined for contribution, adjudication that the passenger's driver was not guilty of negligence constituting a proximate cause of the accident, is res judicata in a subsequent action between the drivers. It is equally true in such a factual situation, where the plaintiff recovers judgment against the original defendant and the jury finds the additional defendant guilty of negligence and that such negligence concurred in jointly and proximately causing plaintiff's injuries and gives the original defendant a verdict for contribution pursuant to the provisions of this statute, such judgment is res judicata in a subsequent action between such drivers, based on the same facts litigated in the cross action in the former trial. Hill v. Edwards, 255 N.C. 615, 122 S.E.2d 383 (1961); Sisk v. Perkins, 264 N.C. 43, 140 S.E.2d 753 (1965).

When Additional Defendant Entitled to Motion for Nonsuit. — For the failure of original defendant to allege and to offer any evidence tending to show that joint and concurring negligence on the part of herself and additional defendant proximately caused injury to plaintiff, additional defendant's motion for judgment of nonsuit should have been sustained. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965).

Consent Judgment in Foreign Action Is Binding. — While this statute makes no reference to consent judgments, it cannot successfully be contended that a consent judgment in a foreign action, based upon an automobile accident within this State, is not binding upon the parties thereto in the absence of fraud. Carolina Coach Co. v. Cox, 337 F.2d 101 (4th Cir. 1964).

Effect of Workmen's Compensation Act.—In an action against a third person tort-feasor by an employee subject to the Workmen's Compensation Act, the defendant is not entitled to join the employer or the insurance carrier for contribution or to set up the defense that its liability is secondary and that of the employer primary. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953); Johnson v. Catlett, 246 N.C. 341, 98 S.E.2d 458 (1957).

Where a third person tort-feasor is sued for the wrongful death of an employee, he is not entitled to have the employer joined as a joint tort-feasor nor as a necessary party to the determination of the action when the original defendant does not rely upon the doctrine of primary and secondary liability. Clark v. Pilot Freight Carriers, 247 N.C. 705, 102 S.E.2d 252 (1958); Jones v. Douglas Aircraft Co., 253 N.C. 482, 117 S.E.2d 496 (1960).

Where the personal repersentative of a deceased employee sued a third person tort-feasor in an action instituted in this State, and defendant had the employer and a fellow employee of the deceased employee joined for contribution, motions of the additional defendants to strike the cross action were properly allowed where it appeared that the deceased was employed in another state, that the injury came within the purview of the compensation act of such state, and that award had been entered therein adjudicating the liabilities of the additional defendants for the death. Johnson v. Catlett, 246 N.C. 341, 98 S.E.2d 458 (1957).

Joint and Several Judgment in Favor

of Plaintiff Held Error.—Where plaintiffs seek no affirmative relief against a codefendant joined by the original defendant for the purpose of enforcing contribution against it as a joint tort-feasor, it is error for the court to enter joint and several judgments in favor of plaintiffs against both defendants upon the jury's finding that both were guilty of actionable negligence, since the liability of the codefendant is solely to the original defendant on its claim for contribution. Pascal v. Burke Transit Co., 229 N.C. 435, 50 S.E.2d 534 (1948); Shaw v. Eaves, 262 N.C. 656, 138 S.E.2d 520 (1964).

Improper Joinder. — When an alleged joint tort-feasor is brought into a case as an additional party defendant, and it turns out that no cause of action is stated against him, either in the main action or in a cross action pleaded by another defendant, he is an unnecessary party to the action and, on motion, may have his name stricken from the record as mere surplusage. Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (1956).

The pleading filed by the original defendant must state facts which are sufficient to show that the original defendant is entitled to contribution from the additional defendant under this statute. If the facts alleged do not suffice to establish a right to contribution, the party or parties brought in as additional defendants are unnecessary parties and may on motion have the allegations stricken and the action dismissed as to them. Etheridge v. Carolina Power & Light Co., 249 N.C. 367, 106 S.E.2d 560 (1959).

Lessees Not Entitled to Join Lessor on Principle of Primary and Secondary Liability. — Where plaintiff sued to recover for injuries sustained when a sign erected over a sidewalk by lessees fell and struck her, lessees were not entitled to join the lessor as a party defendant on the principle of primary and secondary liability, since upon the cause as set out in the complaint, lessees' active negligence created the situation which caused the injury, and therefore lessees were primarily liable. Hobbs v. Goodman, 240 N.C. 192, 81 S.E.2d 413 (1954).

Action against Mining Company.—In an action by property owner to recover damages from mining company due to dumping of silt in river in its mining operations, the defendant could file a cross complaint for contribution against two other mining companies committing the same injurious acts in their operations. Phillips v. Hassett Mining Co., 244 N.C. 17, 92 S.E.2d 429 (1956).

Newspaper May Bring in Individual Author of Libelous Matter.—Where plaintiff sues a newspaper alone for alleged libel, the newspaper, upon allegations that an individual composed the libelous matter and had it published as a paid advertisement, is entitled to have such individual joined as a joint tort-feasor for the purpose of contribution, and such individual's demurrer to the cross action of the newspaper against him is properly overruled. Taylor v. Kinston Free Press Co., 237 N.C. 551, 75 S.E.2d 528 (1953).

Cited in Waden v. McGhee, 274 N.C. 174, 161 S.E.2d 542 (1968); Robertson v. Bankers & Tel. Employers Ins. Co., 1 N.C. App. 122, 160 S.E.2d 115 (1968).

§ **1B-2. Pro rata shares.**—In determining the pro rata shares of tort-feasors in the entire liability

(1) Their relative degree of fault shall not be considered;
(2) If equity requires, the collective liability of some as a group shall constitute a single share; and
(3) Principles of equity applicable to contribution generally shall apply. (1967, c. 847, s. 1.)

§ **1B-3. Enforcement.**—(a) Whether or not judgment has been entered in an action against two or more tort-feasors for the same injury or wrongful death, contribution may be enforced by separate action.

(b) Where a judgment has been entered in an action against two or more tort-feasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

(c) If there is a judgment for the injury or wrongful death against the tort-feasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after final judgment is entered in the trial court in conformity with the decisions of the appellate court.

(d) If there is no judgment for the injury or wrongful death against the tort-feasor seeking contribution, his right of contribution is barred unless he has either

(1) Discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment,

(2) Agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution, or

(3) While action is pending against him, joined the other tort-feasors as third-party defendants for the purpose of contribution.

(e) The recovery of judgment against one tort-feasor for the injury or wrongful death does not of itself discharge the other tort-feasors from liability to the claimant. The satisfaction of the judgment discharges the other tort-feasors from liability to the claimant for the same injury or wrongful death, but does not impair any right of contribution.

(f) The judgment of the court in determining the liability of the several defendants to the claimant for the same injury or wrongful death shall be binding as among such defendants in determining their right to contribution. (1967, c. 847, s. 1.)

Cited in Wall Funeral Home v. Stafford, 3 N.C. App. 578, 165 S.E.2d 532 (1969).

§ **1B-4. Release or covenant not to sue.**—When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor. (1967, c. 847, s. 1.)

Editor's Note.—For note on avoidance of releases in personal injury cases in North Carolina, see 5 Wake Forest Intra. L. Rev. 359 (1969).

§ **1B-5. Uniformity of interpretation.**—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it (1967, c. 847, s. 1.)

§ **1B-6. Short title.**—This article may be cited as the Uniform Contribution among Tort-Feasors Act. (1967, c. 847, s. 1.)

Cited in Waden v. McGhee, 274 N.C. 174, 161 S.E.2d 542 (1968).

ARTICLE 2.

Judgment against Joint Obligors or Joint Tort-Feasors.

§ **1B-7. Payment of judgment by one of several.**—(a) In all cases in the courts of this State wherein judgment has been, or may hereafter be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tort-feasors, and the same has not been paid by all the judgment debtors by each paying his pro rata share thereof, if one or more of the judgment debtors shall pay the judgment creditor, either before or after execution has been issued, the full amount due on said judgment, and shall have entered on the judgment docket in the manner hereinafter set out a notation of the preservation of the right of contribution, such notation shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his pro rata share thereof to the extent of his liability thereunder in law and equity. Such judgment may be enforced by execution or otherwise in behalf of the judgment debtor or debtors who have so preserved the judgment.

(b) The entry on the judgment docket shall be made in the same manner as other cancellations of judgment and shall recite that the same has been satisfied, released and discharged, together with all costs and interest, as to the paying judgment debtor, naming him, but that the lien of the judgment is preserved as to the other judgment debtors for the purpose of contribution. No entry of cancellation as to such other judgment debtors shall be made upon the judgment docket or judgment index by virtue of such payment

(c) If the judgment debtors disagree as to their pro rata shares of the liability, on the grounds that any judgment debtor is insolvent or is a nonresident of the State and cannot be forced under the execution of the court to contribute to the payment of the judgment, or upon other grounds in law and equity, their shares may be determined upon motion in the cause and notice to all parties to the action. Issues of fact arising therein shall be tried by jury as in other civil actions. (1967, c. 847, s. 1.)

Editor's Note. — For comment on this chapter, see 5 Wake Forest Intra. L. Rev. 160 (1969).

ARTICLE 3.

Cross Claims and Joinder of Third Parties for Contribution.

§ **1B-8**: Repealed by Session Laws 1969, c. 895, s. 19.

Cross References.—For provisions similar to those of subsection (b) of repealed § 1B-8, see Rule 14 (§ 1A-1). For provisions of Rules of Civil Procedure as to crossclaims, see Rule 13 (§ 1A-1).

Editor's Note. — Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

The repealed section was enacted by Session Laws 1967, c. 847, s. 1.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October 24, 1969

I, Robert Morgan, Attorney General of North Carolina, do hereby certify that the foregoing 1969 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

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Attorney General of North Carolina

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